88-1271

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HENRY KLEPAK, PETITIONER

v.

ANN McLAUGHLIN, SECRETARY OF THE
UNITED STATES DEPARTMENT OF LABOR

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a non-fiduciary may be held liable under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et. seq.*

2. Whether a party in interest under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et.seq.* may be ordered to refund compensation earned for services rendered to a plan qualified under said act if the fees charged for such services are not earned as a result of a transaction prohibited by the statute.

LIST OF PARTIES

Henry Klepak ..... Defendant/Petitioner

Theodore Shanbaum ..... Defendant

Estate of Ellis Carp ..... Defendant

Oscar C. Lindemann ..... Defendant

Members of Lee Optical Pension and Profit Sharing Plans ..... Beneficiaries of Damages Recovered

TABLE OF CONTENTS

Questions for Review i

List of Parties ii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Statement of the Case 2

Reasons for Granting Writ 6

Conclusion 20

Appendix A —Findings of Fact and Conclusion of Law, Final Judgment and Amended Final Judgment of the District Court 1A

Appendix B —*Whitfield v. Lindemann*, 853 F.2d 1298 (5 Cir. 1988) 32A

Appendix C —Ruling on Petition For Rehearing by the United States Court of Appeals for the Fifth Circuit 52A

Appendix D —Employees Retirement Income Security Act, 29 U.S.C., §1001, §1002, §1104, §1105, §1108, §1109, §1132, §1144 ..... 53A

TABLE OF AUTHORITIES

Cases:

Brock v. Hendershott, 840 F.2d 339 (6 Cir. 1988) ..8, 15, 16
Call v. Sumitomo Bank of California, 689 F. Supp. 1014 (N.D. Cal. 1988) 13, 14
Cort v. Ash, 422 U.S. 66. 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); 13
Donovan v. Bryans, 566 F. Supp. 1258 (E.D. Pa. 1983).. 7
Donovan v. Daugherty, 550 F.Supp. 390 (S.D. Ala. 1982) 7
Donovan v. Schmoutey, 592 F. Supp. 1361 (D. Nev. 1984) 7
Fink v. National Savings and Trust Company, 772 F.2d 951 (D.C. Cir. 1985) 6, 8
Free v. Briody 732 F. 2d 1331 (7 Cir. 1984) 14
Fremont v. McGraw-Edison Co., 606 F.2d 752 (7 Cir. 1979), *cert denied,* 445 U.S. 951 (1980) 6
Freund v. Marshall and Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979) 7, 8, 9, 10
Isaacs v. Group Health, Inc., 668 F. Supp. 306 (S.D.N.Y. 1987) 12
Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2 Cir. 1987) 8, 15, 16
Massachusetts Life Insurance Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) 10, 13, 14
McDougall v. Donovan, 539 F.Supp 596 (N.D. Ill. 1982) 7
McLaughlin v. Biasucci 688 F. Supp. 965 (S.D. NY. 1988) 13, 14, 15
McLendon v. Continental Group, Inc. 7 Empl. Ben. Cas. (BNA) 2403 (D.N.J. 1986) 15
Nieto v. Ecker, et al, 845 F.2d 868 (9 Cir. 1988) 7, 9, 12, 18
Southern California Meat Cutters Unions v. Investors Research, 687 F.Supp 506 (D.C. Cal. 1988).....10, 11
Thornton v. Evans, 692 F.2d 1064 (7 Cir. 1982) 8
Unicorn Group, 3 Empl. Ben. Cas. (P-H) 166..... 7

United Airlines, Inc. vs. McMann, 434 U.S. 192, S. Ct. 444, 54 L.Ed.2d 402 (1977) 10

Whitfield v. Lindemann, 853 F.2d 1298 (5 Cir. 1988) 1, 6, 9, 19

Yeseta v. Baima, 837 F.2d 380, 385 (9 Cir. 1988) 9

Statutes and Regulations:

Supreme Court Rule 17.1(a) 1

Supreme Court Rule 21(f) 2

28 U.S.C. §1254(1) 1

28 U.S.C. §1291 2

28 U.S.C. §1331 2

Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et. seq.* ..... *passim*

29 U.S.C. §1002 ..... 6, 9

29 U.S.C. §1104 14

29 U.S.C. §1106 18

29 U.S.C. §1108 18

29 U.S.C. §1109 ..... 8, 11

29 U.S.C. §1132 19

29 U.S.C. §1144 ..... 11, 12

Miscellaneous:

H.R. Rep. 53 Cong. 1st Sess. 13, 1974 U.S. Code, Cong. and Ad. News at 4639 7

120 Cong. Rec. 29, 932 (1974) reprinted in 1974 U.S. Code Cong. and Admin. News 4639 9

Schwartz, *"Non-fiduciary Liability Under the Employee Retirement Income Security Act"* 69 Marquette Law Review 561 (1986) 7

G. Bogert, *Trusts and Trustees,* §901 (2d 1982) 8

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v.

ANN McLAUGHLIN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Henry Klepak petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, infra, 28a-38a) is reported at 853 F.2d 1298 (5 Cir. 1988). The District Court's opinion is unpublished.

STATEMENT OF JURISDICTION

Jurisdiction is invoked pursuant to Section 28 U.S.C. §1254(1). Under Supreme Court Rule 17.1(a), Petitioner suggests that the United States Court of Appeals for the Fifth Circuit has rendered a decision which directly conflicts with the decisions of other Federal Courts of Appeals on the same matter. Additionally, pursuant to subsection (c) of the same

rule, it is submitted that the above-stated questions for review present important points of Federal law which should be settled by this Court.

Originally, Federal subject matter jurisdiction was conferred in this cause pursuant to 28 U.S.C. §1331 and, following rendition of a judgment by the United States District Court for the Northern District of Texas, cross appeals were filed in the United States Court of Appeals for the Fifth Circuit in accordance with 28 U.S.C. §1291.

A final judgment of the District Court was rendered on 30 January 1987 and amended on 17 March 1987. The Fifth Circuit's decision was entered on 9 September 1988 and Petitioner timely filed Motion for Rehearing, which was denied and entered on the 14th day of October, 1988.

As stated *supra* the statute which this case contemplates is 29 U.S.C. §1001 *et. seq.* Pursuant to Supreme Court Rule 21(f) Petitioner shows that the provisions involved are lengthy and that citation alone will suffice at this point. In accordance with the stated Rule, the pertinent text has been set forth in the appendix, along with all opinions, orders, findings of fact, and conclusions of law rendered below.

STATEMENT OF THE CASE

Original defendants, Theodore Shanbaum and Ellis Carp were the principal shareholders of Lee Optical Inc. ("Lee Optical"). Lee Optical consisted of a chain of retail optical corporations throughout the southwest. The corporation maintained for 350 of its employees a pension plan and a profit sharing plan ("the plans").

In 1980, the United States Department of Labor sued Shanbaum and Carp, seeking to recover some allegedly prohibited loans which had been made by the Plans to certain companies. Defendants in that suit were represented by Henry

Klepak ("Klepak"), a 75 year old Dallas attorney who had represented Lee Optical and its affiliates since 1941.

The 1980 litigation was settled a week before it was scheduled to go to trial by the acceptance of a Consent Order which was executed by the trial judge, Hon. Patrick E. Higginbotham, on 24 September 1981.

Klepak negotiated the Consent Order on behalf of the Defendants in the 1980 litigation and an understanding of its terms are essential to the disposition of the present suit. The Consent Order provided that Dal-Tex, Inc. ("Dal-Tex"), an affiliated company, would reimburse the pension plan in the amount of $1,058,986.00 and the profit sharing plan in the amount of $102,406.00. The Order specifically provided that payment could be made in property rather than in cash, if the transferred property were equivalent to the amounts owed and if payment in kind were in the best interests of the plans. Any unpaid balance would accrue interest at the rate of ten percent (10%) per annum. Additionally, the Consent Order stated that if Dal-Tex could not make the payments, the obligation would fall to the plans' ex-trustees, Shanbaum and Carp. The Order also provided the removal of Shanbaum and Carp from any further fiduciary relationship with the plans, and directed the appointment of a new trustee.

Oscar Lindemann ("Lindemann"), a Defendant in the instant case, became the plans' new trustee. He possessed no prior business or social relationship with Klepak or the Defendants in the 1980 litigation and, due to his background as a bank vice-chairman and service on the investment committee of the American Lutheran Church, was quite experienced in evaluating property and other assets. Klepak properly represented that primary obligors under the Consent Order, Dal-Tex, and Lee Optical, were both on the verge of bankruptcy and that the Consent Order's fulfillment would have to be met by Shanbaum and Carp. The secondary obligors, Shanbaum and Carp, had

only one asset between them which could satisfy their obligation. This asset was a two-thirds interest (one-third each) in a joint venture known as SCP. The other one-third owner was the pension plan. The Joint Venture gave Shanbaum and Carp a divisible ownership in two properties: an AM radio station in Hawaii and a microwave relay system originating in Oklahoma. Consequently, to fulfill the Consent Order, Shanbaum and Carp transferred their interest in the properties to the pension plan. Oscar Lindemann, as trustee, approved the transfer.

The suit from which this Petition for Writ of Certiorari arises commenced in 1984. The United States Department of Labor, on behalf of plan participants, then brought an action in the United States District Court for the Northern District of Texas, claiming that trustee Lindemann had violated his fiduciary responsibility to the plans by not prudently determining the fair market values of the radio station and microwave system before approving the transfer of those properties as directed by the Consent Order. The Labor Department also alleged that Klepak, Shanbaum and Carp all conspired with Lindemann and knowingly abetted him in the breach of his fiduciary duties. A two (2) day bench trial was held before the Hon. J. Buchmeyer on 11-13 January 1987. The damage issue focused on the evaluation of the transferred properties. The Court found in favor of the Plaintiff and, as the sole solvent defendant, Klepak was saddled with more than 2.1 million dollars in liability, including actual operating losses suffered by the plans. The Courts below apparently disregarded the fact that joint venturers are jointly and severally liable. Assuming liability *arguendo,* Klepak would not be liable because he had no part in the joint venture. The pension plan, the third venturer, would have been held properly liable for all obligations. This is pointed out to the Court because the Fifth Circuit failed to address the issue. Klepak was also ordered to indemnify the trustee and to return all compensation which he rightfully earned as attorney for the plans during the period of October 1, 1981 through September 30, 1985.

The United States Court of Appeals for the Fifth Circuit affirmed this decision in part, reversed or vacated in part, and remanded the cause to District Court for further proceedings. Correctly, the Appellate Court vacated the damage award insofar as it applied to the plans' operating losses and reversed Klepak's indemnification of trustee Lindemann. The Court did, however, affirm Klepak's joint and several liability with the other parties defendant and upheld the order refunding his compensation. Regarding the damage award based on the evaluation of the transferred properties, the Fifth Circuit remanded the case to determine whether Shanbaum and Carp had any assets other than the radio station and microwave system which could have been used to satisfy Judge Higginbotham's Consent Order. If they had no others, the Court stated the award of damages based on the overvaluation of the properties must be reduced to $243,038.00, plus prejudgment interest. This figure represents that amount of the plans overpayment as found by the Fifth Circuit. If other assets are found on remand, then the damage figure of $243,038.00, according the Fifth Circuit, may be increased by an amount representing such available assets until the total amount of the unpaid balance of the Consent Order has been reached.

Accordingly, the Fifth Circuit's decision in this case holding an attorney non-fiduciary liable under 29 U.S.C. §1001 *et. seq.*, creates an intercircuit conflict on the matters before the Court.

REASONS FOR GRANTING THE WRIT

I.

A NON-FIDUCIARY MAY NOT BE HELD LIABLE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 29 U.S.C. §1001, *et. seq.*

Petitioner contends that there exists no liability of a non-fiduciary under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et. seq.* ("ERISA"). Holding Klepak, an attorney and non-fiduciary, liable in the instant situation would expand the remedies provided by ERISA beyond Congressional intent. In the face of intercircuit conflict on point, Petitioner urges this Court to absolve him of any liability based on ERISA's unambiguous exclusion of non-fiduciaries from its terms.

Though ERISA is a "comprehensive remedial statute designed to protect the interest of participants in employee benefit plans and their beneficiaries," the statute's letter is limited to fiduciaries. "Non-fiduciary" is not defined by ERISA, though many courts use the act's broad remedial powers to confer liability upon non-fiduciary Defendants.[1] *See e.g. Fink v. National Savings and Trust Company,* 772 F.2d 951 (D.C. Cir. 1985); *Fremont v. McGraw-Edison Co.,* 606 F.2d

[1] ERISA states: [a] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he rendered investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. 29 U.S.C., §1002 (21)(A)(1982).

It neither has been alleged nor found that Defendant Klepak ever acted in a fiduciary capacity in the case at bar. *See Whitfield v. Lindemann,* 689 F. Supp. 678 (5 Cir. 1987).

752 (7 Cir. 1979), *cert denied,* 445 U.S. 951 (1980); *Donovan v. Schmoutey,* 592 F. Supp. 1361 (D. Nev. 1984); *Donovan v. Bryans,* 566 F. Supp. 1258 (E.D.Pa. 1983); *Donovan v. Daugherty,* 550 F.Supp. 390 (S.D. Ala. 1982); *McDougall v. Donovan,* 539 F.Supp 596 (N.D. Ill. 1982); and *Freund v. Marshall and Ilsley Bank,* 485 F. Supp. 629 (W.D. Wis. 1979). One court has even stated, "no sound reason appears why ERISA should be emasculated by a construction which precludes civil actions against non-fiduciaries." *Unicorn Group,* 3 Empl. Ben. Cas. (P-H) 1667.

Undoubtedly, ERISA is construed broadly to effectuate its remedial nature. *See* 29 U.S.C.A. 1001(b) (West 1985). Yet this judicial expansion of ERISA's remedial reach never matches with any satisfactory rationale for holding the legislation applicable to non-fiduciaries. As might be expected, most courts, in attempting to fashion an equitable result, look to the common law of trusts. It is a well-settled common law trust principle that liability be imposed on individuals who knowingly participate in a breach of trust, and it is not disputed that Congress intended the courts to look to common law principles when resolving issues regarding breach of *fiduciary* duties. *See* H.R. Rep. 53 Cong. 1st Sess. 13, 1974 U.S. Code, Cong. and Ad. News at 4639.[2] Yet the judicial liberty of using trust principles against non-fiduciaries is another matter indeed. On this point, Congress has remained silent. The recent case of *Nieto v. Ecker, et al,* 845 F.2d 868 (9 Cir. 1988) provides the Bench's most thoughtful and complete analysis of non-fiduciary liability under ERISA to date. *Nieto* explicitly holds that ERISA does not incorporate common law causes of action not created by provisions of the legislation itself, therefore restricting the statute's reach to fiduciaries. In *Nieto,* pension plan trustees brought an action under ERISA against an attorney retained to represent the Plan in collecting delinquent contribu-

[2] For an excellent discussion of the common law of trusts as it applies to ERISA as well as a scholarly approach to non- fiduciary liability under Statute *see Schwartz,* "Non-fiduciary liability under the Employee Retirement Income Security Act" 69 Marquette Law Review 561 (1986)

tions from employers. The complaint included claims under ERISA and state law and prayed for relief in the form of restitution, punitive damages and injunctive relief. Plaintiffs alleged the attorney, a non-fiduciary, should be held liable under ERISA Section 409(a) as one who conspired and acted with fiduciaries in the breach of those duties.[3] That provision, 29 U.S.C., §1109(a) states:

> "Any person who is a fiduciary with respect to a Plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such Plan any losses to the Plan resulting from each such breach, and to restore to such Plan any profits of such fiduciary which have been made through use of assets of the Plan by the fiduciary, and to be subject to such other equitable or remedial relief as the Court may deem appropriate."

The language of this provision clearly limits its applicability to fiduciaries.

Yet, in circumventing the expression of this statute to allow claims against non-fiduciaries, most courts stretch the reasoning of *Freund vs. Marshall and Ilsley Bank,* 485 F.Supp 629 (W.D. Wis. 1979). *See, e.g. Brock v. Hendershott,* 840 F.2d 339 (6 Cir. 1988); *Lowen v. Tower Asset Management, Inc.,* 829 F.2d 1209 (2 Cir. 1987); *Thornton v. Evans,* 692 F.2d 1064 (7 Cir. 1982); *Fink v. National Savings and Trust Company,* 772 F.2d.

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[3] Such an allegation would provide the linchpin in holding a non-fiduciary liable under the common law of trusts. As professor Bogert stated in his learned treatise, "just as every owner of a legal interest has the right that other shall not, without lawful excuse, interfere with his possession or enjoyment of the property, or adversely affect its value, so the beneficiary, as equitable owner of the trust res. has the right that third persons shall not *knowingly* join with the trustee in a breach of trust". *G. Bogert, Trust and Trustees,* §901 (2nd Ed. 1982). This theory of liability presumes that the breaching non-fiduciary benefited from the breach, and therefore should make restitution to the beneficiaries [emphasis ours]. In the instant case, the fact that Defendant Klepak did not benefit in any way from the purported breach is undisputed.

951 (D. C. Cir. 1985). The *Freund* Court stated that it was the "intent of Congress to federalize the common law of trusts" and incorporate it into ERISA plans. *Freund, supra,* at 635. The Court further stated "in view of the express Congressional intent in enacting ERISA to make applicable the law of trusts, the Court is fully empowered to award the relief available in traditional trust law against non-fiduciaries who knowingly participate . . . in a breach of trust" *Id.,* at 641. However the *Nieto* panel perceptively notes *Freund* merely cites a floor statement by Senator Williams, proclaiming that the goals of the fiduciary liability provisions so far as they apply to the law of trusts were to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets, and to provide effective remedy for breaches of trust. *Nieto,* at 871, quoting 120 Cong. Rec. 29, 932 (1974), reprinted in 1974 U.S. Code Cong. and Admin. News 4639. *Nieto* reasoned that Senator Williams' rather nebulous statement hardly justifies engrafting the complete body of state law into ERISA. *Id.,* at 871. The Court further explained that the "Plaintiffs' lawsuit against the [attorney] is essentially an attorney malpractice suit under state tort law. Absent an explicit directive from Congress, we may not recast it as a federal cause of action merely because [the attorney's] clients happen to be plans covered by ERISA." *Idem.* Petitioner submits that the same reasoning properly applies to the case at bar. Indeed, as Klepak was not counsel for the plans at the time of his purported breach, his liability, if any, must be assessed outside of the ambit of ERISA.[4]

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[4] In the opinion of the United States Court of Appeals for the 5th Circuit in this case, *Whitfield v. Lindemann, et al,* 853 F.2d 1298 (5 Cir. 1988), Judge Van Graafeiland specifically stated, "our reading of the record satisfies us that "Klepak" had not yet become attorney for the plans when the transfer agreement was signed on September 24, 1981. Id., at 1300. The Court then erroneously continues "although Klepak was not a statutory fiduciary under 29 U.S.C., §§1002(14)(A) and (21)(A), *Yeseta v. Baima,* 837 F.2d 380, 385 (9th Cir. 1988), he was, as the District Court held, jointly liable with Lindemann as a non-fiduciary who knowingly participated in a breach of trust."

One could not rightfully argue the exclusion of the state trust law principles in analyzing claims which fall within the scope of ERISA. However, *Freund* and its jurisprudential progeny — and more specifically this case — have used state law trust principles to enlarge the reach of ERISA, under the rubric of Congressional intent. By its own terms though, ERISA is an unambiguous statute and this Court has consistently held that legislative history is irrelevant to the construction of clearly redacted statutes. *United Airlines, Inc. vs. McMann,* 434 U.S. 192, S. Ct. 444, 54 L.Ed.2d 402 (1977).

Further rationale for confining ERISA to its own terms may be found in this Court's decision of *Massachusetts Life Insurance Co. v. Russell,* 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). There, this Court held that a private right of action for extra-contractual damages cannot be applied under ERISA. Justice Stevens aptly noted, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.,* at 147. Against Supreme Court mandate, both the District Court and the Fifth Circuit have in effect acted as super-legislatures: although Congress has provided a remedy only against fiduciaries in ERISA, those forums have seen fit to fashion redress against non-fiduciaries as well.

Other support for confining ERISA liability to fiduciaries may be found in the area of preemption. At issue is whether ERISA preempts state law claims against non-fiduciaries who act in concert with fiduciaries who breach their duties. Obviously, if ERISA preempts state law claims, the Federal remedy may be viewed as exclusive and liability may be conferred upon only non-fiduciaries under the statute. The leading case on point is *Southern California Meat Cutters Unions v. Investors Research,* 687 F.Supp 506 (D.C. Cal. 1988). In the case, Meat Cutters Union pension and trust fund beneficiaries sued a fiduciary investment company and a non-fiduciary brokerage firm and the broker to recover losses arising

from an exclusive agreement between the fiduciary and non-fiduciary, requiring the fiduciary investment company to place most of the trades for the pension fund through the non-fiduciary brokerage firm. The non-fiduciary brokerage firm and broker moved to dismiss state law claims for intentional infliction of emotional distress and fraud against them by asserting ERISA preempts state law claims against non-fiduciaries who act in concert with fiduciaries to defraud pension funds. The Court held that ERISA did not preempt the state law claims by reasoning that ERISA's exclusion of non-fiduciaries from its terms was a good indication that Congress did not intend to regulate the behavior of non-fiduciaries. Specifically in question was liability under 29 U.S.C. §1109 (b), which provides in part "no fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary." Section 1144 of this same act says that any and all state laws which relate to an employee benefit plan are preempted by ERISA.[5] The *Meat Cutters* Court held that Section 1109 of the Act takes precedence over Section 1144 by declaring that although ERISA is a comprehensive remedial statute, it nowhere enunciates a remedy for non-fiduciary misconduct. The Court articulately stated, "Courts which have held that non-fiduciary behavior, if in conjunction with misconduct of an ERISA fiduciary, is regulated by ERISA, have not only taken the liberty to make a distinction where no indication of such a distinction exists in the statute: that the statute intended to cover some, but not all kinds of non-fiduciary behavior; but, these courts have also presumed that the regulation for non-fiduciary misconduct would be the same as that for fiduciary misconduct." It appears that although the preemptive clause has been interpreted broadly, the purpose of the preemptive clause is to provide uniform federal laws an access for those causes of action for which ERISA provides remedies. *Id.*, at 509.

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[5] "The provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 U.S.C. §1144(a).

The same reasoning was applied by *Isaacs v. Group Health, Inc.*, 668 F. Supp. 306 (S.D.N.Y. 1987). In *Isaacs,* pension fund trustees brought action in state court against a pension fund actuary (a fiduciary) and a non-fiduciary computer services provider for breach of contract and negligence. The actuary filed cross-claims and counter-claims and removed the case to Federal district court. The trustees moved to remand the case back to a state forum. In approaching the removal issue, the question arose as to whether the state law claims for breach of contract and negligence were preempted by ERISA. *Isaacs* held that the state suit did not come within the preemptive provisions of ERISA and therefore could not be removed. The Court said, "ERISA's preemptive provision, 29 U.S.C. §1144(a) is 'neither all encompassing . . . nor limited' and claims which do not purport to regulate, directly or indirectly, the terms and conditions of an ERISA plan are not preempted. Plaintiffs' claims do not hinge on a breach of ERISA obligation...[but on] contractual and common law duties to the fund." *Id.,* at 312. The Court further reasoned that, "ERISA nowhere provides for exclusive Federal jurisdiction over claims against *non-fiduciary service providers* who commit malpractice or breach of contract, there is no basis for this Court to find that Plaintiffs' state law claims actually present questions of Federal law governed exclusively by ERISA." *Id.,* at 313. [Emphasis ours]. The cited statement finds ready applicability in the case at bar. Klepak never regulated, directly or indirectly, the terms and conditions of the plans. His obligation under the consent order was not to the plan but to the trustees, Shanbaum and Carp, as a non-fiduciary service provider. Assuming then *arguendo* that Klepak did have some liability in the instant situation, that liability would be delictual or contractual within the ambit of state law.[6]

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[6] This reasoning would follow the pronouncement of the *Nieto* Court, *supra.* The 9th Circuit has rightfully refused to allow a federal cause of action under ERISA for that which would otherwise be a state law claim—merely because covered plan was involved.

No less significant in properly disposing of this issue is a refusal to imply private rights of action under ERISA. The California and New York district benches have lead the way for confining ERISA to its terms on this point. *See Call v. Sumitomo Bank of California,* 689 F. Supp. 1014 (N.D. Cal. 1988), *McLaughlin v. Biasucci* 688 F. Supp. 965 (S.D. NY. 1988).

In *Call,* pension plan fiduciaries sued for contribution from co-fiduciaries, alleging breach of fiduciary duties by those defendants. Plaintiffs also asserted a claim against a non-fiduciary defendant for participating in a co-fiduciary breach. Two issues were presented to the court: (1) whether ERISA authorizes an action for contribution on behalf of individual fiduciary plaintiffs against co-fiduciaries; and (2) whether ERISA may confer non-fiduciary liability. The court answered both questions negatively. In denying the co-fiduciaries private right of action for contribution, the *Call* forum limited ERISA to its terms: although it subjects plan fiduciaries to personal liability, it nowhere authorizes action for contribution against co-fiduciaries. In precluding non-fiduciary liability, *Call* reasoned that fiduciary liability would fully compensate the plan. Moreover, if non-fiduciary liability were to be asserted on behalf of he Plaintiffs individually, the action would be essentially a claim for contribution and should be denied on the reasoning stated above.

In large part, the *Call* court relied on this Court's holding in *Massachusetts Mutual Life Ins. Co. v. Russell, supra,* which holds that ERISA does not allow extra-contractual damages. Reaching that conclusion, this Court applied the four (4) factor test of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (1975): (a) whether the plaintiff is a member of the protected class; (b) whether there is a state law impediment to implying a remedy; (c) the legislative intent; and (d) consistency with legislative scheme. This Court declined to imply an extra-contractual remedy under ERISA in *Massachusetts vs. Russell,*

supra, because there was no legislative intent or history to suggest such a remedy.[7] It is important to note that the *Call* also distinguished the facts before it from those present in the case of *Free v. Briody* 732 F. 2d 1331 (9 Cir. 1984). *Free* a pre-*Massachusetts v. Russell* case, recognized an implied remedy for a passive trustee, allowing indemnification for him from a more culpable, active trustee. *Call* refused to follow the *Free* rationale and stated "that ERISA's comprehensive civil remedy scheme reflects a congressional intent that the remedies explicitly provided be the only remedies available under the statute." *Call,* at 1019.[8] The *Call* court also denied incorporation of common law trust principles into ERISA. In refusing to infer non-fiduciary liability the court stated "that ERISA's remedial scheme is intended to be exclusive." *Id.* at 1021, Footnote 11.

The *McLaughlin* case, *supra*, similarly excluded non-fiduciary liability from ERISA. In *McLaughlin*, the Secretary of Labor sued a plan fiduciary for violating fiduciary duties as presented by 29 U.S.C. §1104 (a) (1) (A) (B).[9] The fiduciary sought a right of contribution against non-fiduciary attorneys who allegedly advised fiduciary with respect to allegedly imprudent investments of plan assets. The question presented to the court was whether a fiduciary charged with breach of his duty may assert an implied right of action for contribution against a

[7] "The six carefully integrated civil enforcement provisions found in section 502(a) of the statute and [ERISA] as finally enacted . . . provides strong evidence that Congress *did not* intend to authorize other remedies that it simply forgot to incorporate *expressly*." [Emphasis ours.] *Russell*, at 146.

[8] Absent a clear indication in the statutory language, the courts should not attempt to adjust or expand the thoughtfully drafted remedial scheme. *See Russell* at 147.

[9] This provision provides that the fiduciary shall exercise his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprises of like character and with like aims."

non-fiduciary. The *McLaughlin* court answered this question negatively, and followed the rationale of *McLendon v. Continental Group, Inc.* 7 Empl. Ben. Cas. (BNA) 2403 (D.N.J. 1986). The *McLendon* court specifically held that ERISA did not provide a claim for contribution by a fiduciary employer against a non-fiduciary union that had allegedly, knowingly participated in the employer's breach of trust. The court concluded that ERISA "was not enacted for the special benefit of employers/fiduciaries and could find no indication in the statute's legislative *history, purpose* and *structure* that revealed an intent to permit actions for contribution by a fiduciary against a non-fiduciary." *McLaughlin*, at 967.

In imposing liability upon Klepak both the District and Appellate Courts have relied principally on two (2) cases, *Lowen v. Tower Asset Management, Inc., supra,* and *Brock v. Hendershott, supra.* As suggested *ante,* these cases stand on common law trust principles to confer non-fiduciary liability and are factually distinguishable from the case before this Court.

In *Lowen*, the trustees of a plan qualified under ERISA hired Defendant entities as investment manager, investment banker and registered broker-dealer to the plans. The investment manager corporation, acting as a fiduciary with discretion over funds, invested 30 million dollars of plan assets into risky, under-capitalized corporate ventures. Additionally, one or more of the individual and corporate defendants owned substantial equity interests in some of the companies into which plan assets were invested. Two of the defendant companies then used plan assets to raise capital for various ventures in exchange for commissions, fees and other securities. Subsequently, plan trustees brought suit against defendant companies alleging that defendants entered into certain transactions which were prohibited by ERISA.[10] The court held the investment manager liable as a fiduciary, and also found that the in-

[10] The statute categorically enumerates certain prohibited transactions not present in the case at bar.

vestment banking corporation and broker-dealer company were jointly and severally liable as non-fiduciaries. Since the defendant corporations were interrelated, the court pierced the corporate veil to reach the non-fiduciary concerns. Moreover, liability was predicated on ERISA's §502(a)(3)(b), which provides for the granting of "equitable relief" to effectuate the statutes remedial nature.

The *Lowen* facts readily distinguish themselves from those surrounding the actions of Klepak. In *Lowen*, the non-fiduciary corporations profited from the fiduciary breaches. All of the investment profits were derived from plan assets, and the individual defendants actually drew "kick-backs" in the form of salaries and bonuses. These transactions left the corporate defendants with virtually no net worth.[11] Klepak received absolutely no profit from the transactions in question. He possessed no authority over plan funds. At all times, he acted on his duty as an attorney at law and simply facilitated the transfer of the only assets available to fulfill Judge Higginbotham's Consent Order.

In *Brock v. Hendershott, supra*, two union representatives created a corporation to solicit business for a group of dentists. A trustee of a dental plan qualified under ERISA influenced various employers to choose a particular dental program. The trustees assistant, a non-fiduciary, handled negotiations between the corporation and the dental program. For every group contract the dental program received the soliciting corporation received a profit. Subsequently, the Department of Labor brought an action to disgorge sums realized by both the trustee and the non-trustee — obtained through abuse of their positions as union representatives. The Trustee and his non-fiduciary assistant were held jointly and severally liable under ERISA for aiding and assisting other representatives in breach

[11] Piercing the corporate veil plays the integral part in the liability aspect of *Lowen*. The court felt that the defendants used the legal fiction of corporate separateness to create personal profit derived from a breach of fiduciary duties.

of fiduciary duties. The court reasoned that the non-fiduciary directly benefited from his actions because, as a part owner of the soliciting corporation, he received a profit every time union local joined the dental program. Unlike the case at bar, personal profit and self-dealing proved the tappet by which a non-fiduciary was held liable under a statute which specifically excludes him from its terms.

Finally, on this point, an important policy consideration militates against non-fiduciary liability under ERISA as it is currently drafted. Petitioner Klepak was at all relevant times performing services to individual trustees, or later, the plans as an attorney-at-law. When he began rendering these services, he was in a relatively new and evolving area of the law. His posture today has a bearing on thousands of attorneys who represent ERISA concerns. The number of employee benefit plans has skyrocketed in recent years creating an expanding specialty within the legal profession. Most attorneys who represent qualified plans or trustees are non-fiduciaries. Rare would be the case that an attorney, acting in such capacity, would exercise any type of authority over plan assets or funds. Accordingly, the question of Klepak's liability presented here will help prescribe conduct for a significant number of attorneys.

Setting worthy standards for the legal profession is an unquestionably necessary goal, but to do so requires circumstances which would give such an expression absolute clarity. Though ERISA excepts certain attorney transactions from its prohibitions, it does not allow for attorney liability in its text. Perhaps Congress should speak to the topic of attorney conduct by amending ERISA. In any event, the present case draws no lines between which lawyer conduct could be prescribed. Holding Klepak liable in this case, when he used his best professional judgment, would only further obfuscate an already muddled area of the law. Logically, then, the issue of attorney services brings us to the next point before the Court.

II.

THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 29 U.S.C. §1001, *et. seq.*, DOES NOT ALLOW FOR THE DISGORGEMENT OF FEES EARNED AS A PLAN ATTORNEY WHERE THE FEES WERE NOT CHARGED AS A RESULT OF A TRANSACTION PROHIBITED UNDER THE STATUTE.

29 U.S.C. §1106 provides that, "a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest". Section 1108 of the same provision, however, exempts certain transactions from the prohibition. One such statutory exception is "contracting or making reasonable arrangements with the party in interest for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor. In this regard, Klepak submits that the part of the judgment below which orders him to refund his compensation, has created another intercircuit conflict.

The case of *Nieto v. Ecker, et al, supra,* presents one resolution of the issue. In *Nieto,* plan beneficiaries sued one Frommer, an attorney retained by the trustees to represent pension plans in collecting delinquent contributions from employers. The plaintiffs claimed that the attorney had repeatedly failed to prosecute lawsuits to collect delinquent contributions and that he had been paid fees for services that he did not render. After holding that ERISA did not apply to non-fiduciaries, as discussed *supra,* the court nevertheless, left open the possibility of disgorging his attorneys fees on remand. The court reasoned while [Frommer] is not a fiduciary, he does have a status defined by the act: because he provides services to the funds, he is a party in interest under ERISA." The actions in the complaint, if true, establish that Frommer participated in

such prohibited transactions with the funds by receiving excessive compensation for legal services, obtaining a loan from the funds, and engaging in similar activities in violation of ERISA." *Nieto,* at 873.[12] According to the relevant provisions, exacting unreasonable attorneys fees would be a prohibited transaction under ERISA. That is, the exception for legal services is predicated on the fact that "no more than reasonable compensation" is paid to the attorney. Presumably, exacting fees for services that one neglects to perform prove unreasonable under the statute. Such was the case in *Nieto.*

What is less clear, however, and the apparent basis for resolution of this issue under the instant suit, is just what standard is dictated by ERISA when a court determines the reasonableness of fees charged by party in interest service providers. It has been neither alleged nor proved that Klepak ever neglected a single matter entrusted to him as attorney for the plans.[13]

If ERISA does not preempt state law as discussed *supra* and the standard of reasonableness is not defined by the statute, then one may only assume that state law provides the basis for determining the propriety of fees earned by attorneys and other plan service providers. Assuming *arguendo* the applicability of state law, the Department of Labor in the proceedings below *offered no evidence regarding the unreasonableness of Klepak's legal fees.* Petitioner proffered the only evidence on the point.

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[12] 29 U.S.C. §1132(a)(3) empowers the court "to redress such violations" [resulting from prohibited transactions].

[13] Please recall that Klepak was not the plans' attorney at the time of the purported breach which forms the basis for the first question presented to this Court. Indeed, the Fifth Circuit stated, "our reading of the record satisfies us that he [Klepak] had not yet become attorney for the plans when the transfer agreement was signed on September 24, 1981." *Whitfield v. Lindemann, supra,* at 1302-3. If the courts below ordered Klepak to refund his compensation as a result of transactions performed under the Consent Order, then such issue is properly addressed by the first question presented to this Court for review.

The court below has further confused the issue by ordering trustee Lindemann, a fiduciary, to refund only one-half of his compensation, while mandating that Klepak be disgorged of everything he earned as counsel to the plans.

Accurately, Petitioner urges that this Court resolve the compensation issue in light of the suggested holding regarding non-fiduciary liability. If ERISA's remedies are limited to fiduciaries and its text does not speak to the reasonableness of compensation, any disgorgement proceeding must be had under state law. Such a holding would accord with ERISA's intent not to preempt state law and would be consistent with this Court's ruling that ERISA applies only to fiduciary liability.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ HENRY KLEPAK

HENRY KLEPAK, Pro se

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 28.3, the undersigned certifies that he has mailed a copy of this Petition for Writ of Certiorari, by United States mail, certified, return receipt requested, postage prepaid, to all counsel of record this 6th day of January, 1989, addressed as follows:

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/s/ HENRY KLEPAK

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM E. BROCK, Secretary of the United States Department of Labor,
Plaintiff,

vs.

OSCAR C. LINDEMANN, *et al.*,
Defendants.

CIVIL ACTION No. CA3-84-1814-R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial on January 12, 1987, against defendants Oscar Lindemann, Theodore Shanbaum and Henry Klepak, settlement having been reached as to all other defendants. In addition to the facts stipulated to by the parties and the findings of facts and conclusions of law announced orally by this Court at the end of the trial, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P., and enters judgment for the Secretary pursuant to Rule 58, Fed. R. Civ. P.

I. FINDINGS OF FACT

A. General Background

1. The Lee Optical and Associated Companies Pension Plan and Profit Sharing Plan (herein referred to as "the Pension Plan" and "the Profit Sharing Plan" or collectively as "the Plans") are employee benefit plans created in 1951. From that time to the present, they have provided retirement income or deferred income to employees of Lee Optical, Inc., and its

subsidiaries. The Profit Sharing Plan has approximately $5.6 million in assets and 750 participants. The Pension Plan has approximately $5 million in assets and 430 participants. From at least January 1, 1975, until September 24, 1981, defendant Shanbaum served as a trustee of the Plans.

2. Lee Optical, Inc., operates approximately 150 stores in 19 states and is an employer engaged in interstate commerce. Prior to October 1982, Dal-Tex, Inc., was a wholly-owned subsidiary of Lee Optical, Inc., and a sponsoring employer of the Plans. On October 2, 1981, Lee Optical, Inc., and all its wholly-owned subsidiaries petitioned for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §1101 *et seq.* The amended plan of reorganization, approved by court order dated October 22, 1982, merged all the subsidiaries into the parent corporation. *In Re Lee Optical, Inc., et al.,* No. 381-01315-G (Bankr. N.D. Tex. Oct. 22, 1982). From at least 1976 through September 1981, defendants Theodore Shanbaum and Ellis Carp owned directly or indirectly 50 per cent of the shares of Lee Optical, Inc. and Dal-Tex, Inc. During the same period of time, defendant Shanbaum served as Chairman of the Board of the two companies and Ellis Carp served as President.

3. Grayson Enterprises, Inc., was a corporation owned one-third each by Shanbaum, Ellis Carp and the Pension Plan. Shanbaum served as Chairman. Grayson Enterprises was dissolved in July 1981 and its remaining assets were transferred to a joint venture known as SCP, which was owned one third each by Shanbaum, Carp and the Pension Plan. Shanbaum served as General Manager of SCP. Among the assets transferred to SCP was an AM radio station in Hawaii (KCCN-AM) and a microwave telecommunications system in west Texas.

4. On September 24, 1981, a consent order was entered in *Donovan v. Shanbaum,* No. C3-80-114-G (N.D. Tex. Sept. 24, 1981), resolving litigation which had been initiated by the

Secretary of Labor against Shanbaum, Carp, Lee Optical and Dal-Tex, under the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. §1001 *et seq.*). The Secretary of Labor's complaint in that action alleged that the defendant trustees of the Plans had breached their fiduciary duties by, among other things, lending and transferring substantial amounts of the assets of each Plan for use by companies owned by the defendants. The defendants in that action denied that they had violated ERISA. Henry Klepak, a Dallas attorney, represented the defendants in that legal action. On their behalf, Klepak negotiated and signed the Consent Order with the Department of Labor. Klepak had acted as the personal attorney for Shanbaum and Carp for over 40 years. He had also provided legal services to Lee Optical, Dal-Tex, Grayson Enterprises, and SCP prior to the Consent Order.

5. In the Consent Order, defendant Shanbaum was removed as trustee of the Plans and was permanently enjoined from serving in that capacity. In his place, defendant Oscar C. Lindemann, who had been approved by the parties, was appointed the sole trustee of the Plans. Lindemann had no previous connection with any of the parties in the lawsuit. Under the Consent Order, Lindemann was given exclusive authority and responsibility for the investment and management of all assets of the Plans. He was authorized to receive reasonable compensation from the Plans for his services consistent with fees normally paid other persons or entities in similar capacities. In addition, the Consent Order permitted Lindemann to assess the Plans for all fees reasonably necessary for appraisal of property or other actions necessary to carry out the provisions of the Order or which, from time to time, were required to properly manage the assets of the Plans.

6. Lindemann voluntarily accepted his appointment and assumed the duties of trustee on September 24, 1981, the same day the Consent Order was entered. He received a copy of the Consent Order and reviewed its provisions with Henry Klepak.

At the time of his appointment, defendant Lindemann was Vice-Chairman of the Board and Director of the National Bank of Commerce in Dallas, Texas. He had also served since 1959 on the Investment Committee of the American Lutheran Church Pension Plan. Lindemann served as sole trustee of the Plans until his tenure was terminated upon entry by the Court of an Order Supplementing Consent Order on April 4, 1983.

7. The claims which Plaintiff has made against Lindemann all relate to transactions which occurred very shortly after the entry of the September 24, 1981 Consent Order in Civil Action CA3-80-0114-G. Lindemann was not a party to that action and was not involved in it in any respect until he was appointed trustee in the Consent Order. He was appointed with the consent of the Department of Labor after his qualifications were investigated by its Dallas office. Lindemann's only knowledge of the matters involved in that action, and of the negotiation and entry of the Consent Order, came from oral statements made to Lindemann by defendant Klepak, whom Lindemann had known for a number of years, and whose statements Lindemann believed to be true.

B. The Transfer of KCCN-AM and the Microwave Telecommunications System to the Pension Plan

8. Under the Consent Order, Dal-Tex was ordered to repay to the Profit Sharing Plan $102,406.31 as interest due and owing on debts incurred by Dal-Tex to the Profit Sharing Plan from January 1, 1975, until the date of the Consent Order. Dal-Tex was further ordered to repay the Pension Plan $1,058,986.07, representing the balance of principal and interest owed on the date of the Consent Order under a promissory note made by Dal-Tex to the Pension Plan on June 28, 1974. The total amount required to be repaid to the Plans was $1,161,392.38. In the event Dal-Tex failed to make complete restitution, defendants Shanbaum and Carp were to be jointly and severally liable to pay the amounts required under the Consent Order.

9. In the Consent Order, it was noted that Shanbaum and Carp had proposed to satisfy their monetary obligations to the Plans by transferring properties or assets of equal value to the Plans. The Consent Order provided that, in the event this proposal was renewed after Lindemann assumed his duties as trustee, he was to determine, within three months, whether such property was equivalent to the amounts owed, and whether the proposed transaction would be in the best interests of the Plans and their participants and beneficiaries. If Lindemann, as trustee, was satisfied that these two conditions were met, the Consent Order provided that he was to accept the properties in lieu of cash payments.

10. On September 24, 1981, the same day the Consent Order was entered, Lindemann, in his capacity as trustee for the Plans, signed an agreement accepting the interests of defendants Shanbaum and Carp in KCCN-AM and the microwave telecommunications system owned by SCP, in full satisfaction of the amounts owed under the Consent Order. For purposes of the transfer of Shanbaum's and Carp's two-thirds interest in these properties to the Pension Plan, KCCN-AM was assigned a total value of $950,000. The agreement, however, contains no reference to a fair market value appraisal made to determine this assigned value. The West Texas microwave system was assigned an "appraised value" of $1,338,927.00. Based on the above values, Shanbaum and Carp's combined two-thirds interest in both these properties was worth $1,525,951.00. The difference between the total amount owed to the Plans under the Consent Order ($1,161,392.38) and the total amount deemed to have been paid to the Pension Plan by transfer of the properties ($1,525,951.00) was calculated in the agreement to be $364,558.96. On November 20, 1981, this amount was paid in cash, on behalf of the Pension Plan, to SCP. By check dated May 11, 1982, the Pension Plan paid to the Profit Sharing Plan $107,546.22, representing the $102,406.31 owed to the Profit Sharing Plan under the Consent Order and interest amounting to $5,139.91.

11. Of the $364,558 paid by the Pension Plan to SCP, Shanbaum obtained $125,000 and used it to repay a debt incurred by Lee Optical, Inc.

12. Neither Lindemann nor Klepak had any prior experience purchasing, valuing or managing radio stations or microwave systems. Lindemann, however, made no effort to investigate the properties offered, did not reveiw or request any appraisals of the radio station or the microwave telecommunications system, and made no determination of their respective incomes, before accepting their transfer to the Pension Plan in satisfaction of the defendants' obligations under the Consent Order. He made no inquiries as to the financial condition of the properties and received no financial information on the properties. He consulted no persons with special training in the fields of radio station or microwave telecommunications evaluation before accepting the properties for the Pension Plan at the values designated in the agreement. Moreover, at the time he accepted the properties, Lindemann had made no determination of whether he intended to sell them or operate them on behalf of the Pension Plan, and whether either option was feasible.

13. When Lindemann was notified by Klepak that his appointment as trustee had been approved, Klepak advised Lindemann that the transfers of property which were contemplated by the Consent Order had already been agreed to by Plaintiff, through its attorney James Petrick, and by the other parties to that action, and that the transfer merely needed to be completed in order to effectuate the agreement which had already been made before Lindemann was named trustee. To this end, Klepak had prepared an Agreement to be executed between the Pension Plan and the Profit Sharing Plan, on the one hand, and SCP Joint Venture, on the other, with respect to the conveyance to the Pension Plan of a two-thirds interest in two properties (the microwave system and the radio station), in which the other one-third interest was already owned by the

Pension Plan, in satisfaction of the indebtnesses set forth in the Consent Order.

14. Klepak represented to Lindemann that the agreement which he had prepared (including the values set out therein) embodied the "deal" to which Petrick had agreed. Klepak did not tell Lindemann anything about there being any possible challenge to the values for these properties which were assigned in the agreement for the transfer which Klepak prepared for Lindemann to execute as trustee. Lindemann believed, based upon Klepak's representations, that the values set out in the agreement were correct and in any event were the values which had been assigned for the purpose of the transaction.

15. Prior to the transfer, Klepak discussed the conveyance of the radio station and microwave with Theodore Shanbaum and Ellis Carp, who agreed to make the conveyance at the stated values. Klepak then drafted the agreement and presented it to the parties for their signature on September 24, 1981.

16. The only appraisal prepared on the microwave telecommunications system prior to the transfer of Shanbaum and Carp's two-thirds interest, was that prepared by Frazier Gross and Clay (now Frazier Gross and Kadlec) dated February 1, 1979, more than two and a half years before the transfer. This appraisal valued the system as of that date at $1,338,927, which was the value at which the system was transferred to the Pension Plan in 1981.

17. After the transfer on September 30, 1981, Dan Hayslett and Associates submitted an appraisal of the radio station KCCN-AM addressed to Theodore Shanbaum. The contents of this appraisal were not disclosed to anyone outside the Hayslett firm prior to September 30, 1981. The Hayslett appraisal determined the fair market value of the radio station to be $1,018,000. The appraisal states that it assumes "attractive terms". Daniel Hayslett, who conducted the aforesaid appraisal of KCCN-AM, testified that "attractive terms" would

include a moderate down payment with the balance paid out over several years, not a transfer with full payment in cash, which would have resulted in a lower valuation.

18. The transfer of the radio station and microwave system licenses were subject to the approval of the Federal Communications Commission. Such approval was given in March 1982. No copies of the appraisals were attached to the F.C.C. filings concerning the transfer of these licenses. Two employees of the F.C.C. who reviewed the applications at the time they were filed testified that this agency does not consider the appraised value of a microwave system or an AM radio station when deciding whether to approve a license transfer. These employees testified that the F.C.C. did not determine whether the microwave system or KCCN-AM had been accurately appraised at the time of transfer. The Court finds the testimony of these witnesses, which was introduced by deposition transcripts, to be authoritative and credible.

19. Robert Jones, an expert in the field of microwave telecommunications valuation, testified that the microwave system had a fair market value of between $900,000 and $1,000,000, as of September 24, 1981. Moreover, Mr. Jones testified that the value of this system to a tax exempt entity, such as the Pension Plan, would have been $525,600, as of September 24, 1981, because a tax exempt entity would gain no benefit from tax deductions afforded by the system in the first years after purchase. Mr. Jones further testified that Mr. Lindemann, in agreeing to accept the microwave failed to follow the procedures which would have been followed by prudent persons experienced in evaluating, buying and running microwave systems. The Court finds Mr. Jones to be a well-informed and credible witness.

20. Charles Kurtz, an expert in the field of radio station valuation, testified that KCCN-AM had a fair market value of $600,000 as of September 24, 1981, in an all cash transaction.

Mr. Kurtz testified that Mr. Lindemann, in agreeing to accept KCCN radio station, failed to follow the procedures which would have been followed by prudent persons experienced in evaluating, buying and running radio stations. The Court found Mr. Kurtz to be a well-informed and credible witness.

21. Based on the combined fair market value of $1,600,000 for the two properties determined by Mr. Jones and Mr. Kurtz (1,000,000 + 600,000), the two-thirds interest of Shanbaum and Carp had a fair market value of no more than $1,066,667 as of September 24, 1981.

22. If the the microwave system is valued in relation to ownership and operation by a tax exempt entity, such as the Pension Plan, then the combined value of the properties would be $1,125,600 (525,600 + 600,000). Based upon this value, the Court finds that the two-thirds interest of Shanbaum and Carp in the properties was worth no more than $750,400 as an operating investment to the Pension Plan as of September 24, 1981.

23. Lindemann, at the time he accepted the properties, had made no determination of whether to sell the microwave system or operate it as an investment for the Pension Plan. He also made no investigation of whether and under what terms the system could be sold by the Pension Plan.

24. From May 1982 through March 1983, the Pension Plan had operating losses attributable to KCCN-AM and the microwave system of $347,514.

25. The Court, based on its review of the evidence adduced at trial and on its assessment of the credibility of the witneses, finds that the Department of Labor did not approve or agree to the terms of the transfer of KCCN-AM and the microwave telecommunications system to the Pension Plan prior to or following the entry of the Consent Order. The Department of Labor was not aware of the terms of the transfer

of KCCN-AM and the microwave system to the Pension Plan more than three years prior to the initiation of this lawsuit.

C. The Compensation Arrangements

26. Shortly after his appointment, Lindemann met with Klepak and Shanbaum to discuss the affairs of the Plans and what needed to be done to administer them. Lindemann concluded that he would need the assistance of individuals who were knowledgeable of the affairs and assets of the Plans, and, at the suggestion of Klepak, he signed an agreement with Klepak, on behalf of the Plans, for Klepak to serve as their attorney. Similarly, he retained Shanbaum as a consultant because of Shanbaum's in-depth knowledge of the Plans' widely-scattered assets. The rates of compensation for Lindemann, Klepak and Shanbaum were established by Lindemann in consultation with Klepak. Klepak suggested the amount of his own fee, and Lindemann approved it.

27. On or about September 28, 1981, Lindemann authorized his own compensation as trustee at $3,000 per month. During the period in which he served as trustee, from September 28, 1981, through April 4, 1983, Lindemann received a total of $54,000 from the Plans. At the time he assumed the position as trustee of the Plans, Lindemann anticipated that his responsibilities would require approximately one hour per month of his time. Throughout the period in which he served as trustee of the Plans, Lindemann continued to serve as Vice Chairman of the Board and Director of the National Bank of Commerce. To the extent that Lindemann's responsibilities exceeded those which he anticipated, his compensation was not unreasonable.

28. At the same time he set his own compensation, Lindemann hired Henry Klepak as general counsel to the Plans and authorized Klepak's compensation at $2,500 per month. Klepak's contract was irrevocable for four years and specifically did not include services such as litigation and legal research. The contract also called for Klepak to be paid an additional

$500 per day, plus expenses, whenever he traveled outside the city of Dallas on behalf of the Plans. During the period from September 28, 1981, through April 4, 1983, when he was removed as attorney for the Plans, Klepak received a total of $45,000 in compensation from the Plans. In determining the levels of compensation for both himself and Klepak, Lindemann relied exclusively on representations made by Klepak. The Court finds that Klepak's compensation in the form of a monthly retainer of $2,500 was unreasonable. The Court further finds that the Plans suffered as a result of Klepak's conflict of interest and tainted relationship with the defendants.

29. On or about September 28, 1981, Lindemann hired Shanbaum as a consultant to the Plans and authorized compensation for Shanbaum at $4,167 per month. During the period from September 28, 1981, through April 4, 1983, when he was removed as consultant to the Plans, Shanbaum served as a consultant to the Plans and received compensation of $75,000.

D. The Payment of Moving Expenses by the Profit Sharing Plan to Lee Optical, Inc.

30. On February 1, 1975, pursuant to an agreement dated August 28, 1974, the Profit Sharing Plan purchased from Dal-Tex, Inc., a tract of property and improvements, which included a building located at 1403 Slocum Street, also known as the Peerless Life Building, in the City of Dallas, Texas. Immediately on purchasing the Peerless Life Building, the Profit Sharing Plan leased the building for a term of 20 years beginning February 1, 1975, to Dal-Tex.

31. The Profit Sharing Plan documents contain no provisions explicitly authorizing the acquisition or holding by the Plan of real property leased to Lee Optical, Inc., or any of its subsidiaries or affiliates.

32. At the time of acquisition of the Peerless Life Building, the Profit Sharing Plan had assets with a total value of

$5,142,902. According to an appraisal, the Peerless Life Building alone had a value of $1,650,000 as of July 1974. Thus, immediately upon its acquisition, the fair market value of the building exceeded ten per cent of the fair market value of the assets of the Profit Sharing Plan.

33. Based on annual financial disclosure reports, which the Profit Sharing Plan filed with the Department of Labor, the Profit Sharing Plan reported the following amounts as the fair market value of its total assets at the close of each year from 1975 through 1981.

1975	$6,011,133
1976	5,434,820
1977	5,348,789
1978	5,463,374
1979	6,813,249
1980	7,040,784
1981	5,163,887

34. As of January 1, 1980, the Profit Sharing Plan had not divested real property, leased to any of its sponsoring employers, having a fair market value equal to 50 per cent of the amount by which the value of such real property exceeded 10 per cent of the value of the Profit Sharing Plan's assets.

35. On or about March 17, 1981, the Profit Sharing Plan and Dal-Tex agreed to terminate the lease on the Peerless Life Building, on the condition that the Profit Sharing Plan pay to Dal-Tex the cost of moving to a new location. On September 2, 1981, the Profit Sharing Plan paid $102,246 to Lee Optical, Inc., as expenses for moving to and remodeling its new location, in consideration for cancellation of the lease on the Peerless Life Building.

36. Defendant Shanbaum, in his dual capacities as Chairman of Lee Optical, Inc., and trustee of the Plans, was aware of the lease cancellation on the Peerless Building and the agree-

ment to pay Dal-Tex's moving expenses, and the credit for improvements. Shanbaum advised the other trustees of the Profit Sharing Plan to accept the cancellation of the lease and to pay the expenses. Shanbaum abstained from the trustees' vote on the agreement.

37. Upon termination of the lease, the Profit Sharing Plan sold the premises at 1403 Slocum Street for $2,250,000 to an unrelated third party.

E. Lindemann's Cross-Claims For Indemnification

38. Klepak misrepresented to Lindemann, the nature of prior discussions with Jim Petrick and led Lindemann to understand, that the Agreement for the transfer of assets, which Klepak had prepared, accurately set out the agreement between the parties.

39. Klepak failed to reveal to Lindemann all of the essential facts about the appraisals to which Klepak referred.

40. Klepak failed to tell Lindemann the facts with regard to certain potential income tax assessments against Grayson Enterprises, Inc.

II. CONCLUSIONS OF LAW

A. General Background

1. The Court has jurisdiction over this action pursuant to section 502(e)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132(e)(1). Venue is proper in this district pursuant to ERISA §502(e)(2), 29 U.S.C. §1132(e)(2). The Secretary of Labor has authority to bring this action pursuant to ERISA §§502(a)(2) and (5), 29 U.S.C. §§1132(a)(2) and (5).

2. From January 1, 1975, through the present, the Lee Optical and Associated Companies Pension and Profit Sharing Plans ("the Plans") have been employee pension benefit plans

within the meaning of ERISA §3(2)(A), 29 U.S.C. §1002(2)(A).

3. From January 1, 1975, until September 24, 1981, defendant Theodore Shanbaum was a fiduciary as defined at ERISA §3(21), 29 U.S.C. §1002(21), with respect to the Plans and thus, during such time, was subject to the provisions of ERISA §§404-406, 29 U.S.C §§1104-1106.

4. From September 24, 1981, until April 4, 1983, defendant Lindemann was a party in interest and fiduciary as defined at ERISA §§3(14)(A) and 3(21), 29 U.S.C. §§1002(14)(A) and (21), with respect to the Plans, and was thus subject to ERISA §§404-406, 29 U.S.C. §§1104-1106.

5. During the period from September 24, 1981, through April 4, 1983, defendant Henry Klepak was a party in interest, as defined at ERISA §3(14)(B), 29 U.S.C. §1002(14)(B), with respect to the Plans.

6. From January 1, 1975, until September 1982, Dal-Tex, Inc., was a party in interest with respect to the Plans as defined at ERISA §3(14)(C), 29 U.S.C. §1002(14)(C).

7. From January 1, 1975, through the present, Lee Optical, Inc., has been a party in interest with respect to the Plans, as defined at ERISA §3(14)(C), 29 U.S.C. §1002(14)(C).

B. The Transfer of KCCN-AM and the Microwave System to the Pension Plan

8. Defendant Lindemann, in his capacity as fiduciary of the Plans, violated ERISA §§404(a)(1)(A) and (B), 29 U.S.C. §§1104(a)(1)(A) and (B), by acting imprudently and not solely in the interest of the Plans' participants and beneficiaries, in causing the Plans to accept the transfer of KCCN-AM and the microwave telecommunications system. Based on Lindemann's own testimony, he made no independent investigation of the values of these properties, or of their suit-

ability as plan investments before accepting them as more than full satisfaction of the $1,161,392 owed to the Plans by Dal-Tex, and secondarily by Shanbaum and Carp, under the Consent Order. Instead, Lindemann accepted the properties based solely on the representations of Henry Klepak, who had represented Shanbaum in the litigation giving rise to the Consent Order and who had been a lawyer for Shanbaum, Carp and their companies for more than 40 years. Klepak's representation that the terms of the transaction had been approved by the Secretary and the Court, however, was belied by the language of the Consent Order, which unambiguously placed on Lindemann the responsibility to approve the transaction. Moreover, had Lindemann even requested to see the appraisals that Klepak claimed to support the valuations, he would have found that the microwave appraisal was more than two and one half years old and that no such appraisal of KCCN existed at the time. As a fiduciary, Lindemann was charged with safeguarding the interests of the Plans' participants. Given his lack of expertise in the field, at the least, he should have required the production of current independent appraisals. His utter reliance on the representations of those who have no expertise in the relevant field and who are not in a position to provide independent advice was not consistent with the responsibilities of a fiduciary. Such a total abdication of fiduciary responsibility falls squarely within the conduct governed by ERISA §§404(a)(1)(A) and (B). *Donovan* v. *Mazzola,* 716 F.2d 1229 (9th Cir. 1983).

9. The Court has found, based on its determination of the credibility of the witnesses, that the Department of Labor did not agree, either prior to or following the entry of the Consent Order, to the terms of the transfer of KCCN-AM and the microwave telecommunications system. Henry Klepak's testimony that there was such an agreement, which the Court found not to be credible, is inconsistent with the language of the Consent Order and therefore, alternatively, it should be dis-

regarded pursuant to the parol evidence rule. *Robinson* v. *Vollert,* 602 F.2d 87, 92 (5th Cir. 1979); *Harville Rose Service* v. *Kellog Co.* 448 F.2d 1346, 1349 (5th Cir. 1971).

10. Based on the plaintiff's expert witness testimony concerning the value of the properties at the time of the transfer, the investigation required by a prudent person experienced in purchasing, evaluating and managing such properties and the fact that Lindemann had made no determination as to whether to sell the properties or to operate them on behalf of the Pension Plan, the Court concludes that a prudent fiduciary who determined to purchase such properties, under the circumstances, would have valued the microwave system at no more than $525,600, and KCCN-AM at no more than $600,000, for a combined value of Shanbaum's and Carp's two-thirds interest in these properties of $750,400. As a result the Pension Plan suffered an immediate loss of $775,551, upon Lindemann's acceptance of the properties.

11. A non-fiduciary who knowingly participates with a fiduciary in a breach of trust, is jointly and severally liable with the breaching fiduciary. *Fremont* v. *McGraw Edison,* 606 F.2d 752, 759 (7th Cir. 1979), *cert. denied,* 445 U.S. 951 (1980); *Thornton* v. *Evans,* 692 F.2d 1064, 1078 (7th Cir. 1982); *Donovan* v. *Bryans,* 566 F. Supp. 1258, 1266-67 (E.D. Pa. 1983); *McDougall* v. *Donovan,* 539 F. Supp. 596 (N.D. Ill, 1982). The elements of knowing participation are (1) an act or omission that furthers or completes the breach and (2) actual or constructive knowledge at the time that the transaction amounted to a breach, or the legal equivalent of such knowledge. *Brock* v. *Gerace,* 635 F. Supp. 563, 567 (D. N.J. 1986); *Donovan* v. *Schmoutey,* 592 F. Supp. 1361, 1396 (D. Nev. 1984); Bogert, the Law of Trusts and Trustees §901 (rev. 2d ed. 1982), cited in *Freund* v. *Marshall & Isley Bank,* 485 F. Supp. 642 (W.D. Wis. 1979).

12. Theodore Shanbaum knowingly and actively participated in Lindemann's breach of fiduciary duty. He offered the

properties and their values without providing the new trustee any appropriate appraisals or other information on the properties. Moreover, he received assets of the Plan in the form of cancellation of his $1,161,392 debt to the Plans plus he received his $125,000 share of the $364,558 paid by the Plan to SCP. At common law, the unjust receipt of trust assets resulting from a fiduciary breach is sufficient participation to establish knowing participation. *See Donovan* v. *Schmoutey,* 594 F. Supp. at 1396.

13. As general manager of SCP, Shanbaum had actual or constructive knowledge of the fact that the microwave appraisal was more than two and one half years old, and that no appraisal of KCCN-AM existed at the time of transfer. Moreover, Shanbaum was also aware or reasonably should have been aware that Lindemann was agreeing to the transfer on his first day as trustee and thus could not have had an adequate opportunity to make a careful and prudent investigation of the properties. This knowledge together with his active participation in the transfer makes Shanbaum fully liable along with Lindemann and Klepak for the losses suffered by the Plan.

14. Henry Klepak knowingly and actively participated in Lindemann's breach of fiduciary duty with respect to the transfer. He drafted the transfer agreement and induced Lindemann to sign it with the false representation that the terms had been approved by the Secretary of Labor and the Court. Like Shanbaum, he had actual or constructive knowledge that the microwave appraisal was more than two years old and that no appraisal existed of KCCN-AM. Klepak also knew or should have known that Lindemann had had no time to conduct anything approaching a prudent investigation before signing the agreement. Klepak's knowledge and participation makes him fully liable, along with Shanbaum and Lindemann for the losses suffered by the Pension Plan in the transfer.

15. Accordingly, defendants Lindemann, Shanbaum and Klepak are jointly and severally liable for the $775,551 in immediate losses suffered by the Pension Plan.

16. In addition to their liability for the immediate losses suffered by the Pension Plan as a result of the property transfer, Lindemann, Shanbaum and Klepak are jointly and severally liable for the $347,514 in operating losses suffered by the Pension Plan from March 1982, when, following FCC approval, the Pension Plan assumed full ownership of the properties, to April 4, 1983, when Lindemann, Shanbaum and Klepak were removed from their positions with the Plans. These operating losses are a direct result of the original fiduciary breach committed and in which Shanbaum and Klepak knowingly participated.[1]

C. The Compensation Arrangements

17. Defendant Lindemann, in his capacity as trustee of the Plans, violated ERISA §§404(a)(1)(A) and (B), 29 U.S.C. §§1104(a)(1)(A) and (B), by acting imprudently and not solely in the interests of the Plans' participants and beneficiaries, in setting his own and Henry Kelpak's compensation at $36,000 per year and $30,000 per year respectively. Lindemann's absolute reliance on Klepak in setting his own salary, even though he anticipated spending only one hour per month on his duties with respect to the Plan, and his similar reliance on Klepak for setting Klepak's salary and terms of employment, which included an irrevocable four year contract, are additional instances of his abandonment of fiduciary responsibilities in effecting important transactions on behalf of the Plans. Plaintiff did not demonstrate that the amount of Mr. Lindemann's compensation, in terms of his actual responsibilities and the time actually spent on Plans business was unreasonable. However, pursuant to the equitable powers of the Court, the Court finds that the appropriate remedy is a forfeiture of one-half of Lindemann's entire compensation

[1] The Secretary of Labor offered no evidence of operating losses beyond April 4, 1983. This Conclusion of Law is not intended to imply that, as a matter of law, the defendants could not have been liable for any losses beyond their tenure with the Plans. The issue of such liability was not before the Court.

while trustee due to his breach of trust with regard to the property transfer. *Marshall* v. *Snyder,* 1 EBC 1878, 1888; (E.D.N.Y. 1979) Bogert, *The Law of Trust and Trustees* §980 (rev. 2nd ed. 1983). Lindemann is therefore additionally liable for $27,000 or one-half of the $54,000 in salary he received from the Plans.

18. Defendant Klepak knowingly and actively participated in Lindemann's breach of fiduciary duty with respect to the compensation arrangements for himself and Lindemann. Klepak provided Lindemann's only advice as to the level of these salaries and as to the terms of his own compensation agreement, which were very favorable to Klepak. As a result, Klepak is liable for the $45,000 in total compensation that he received. *See Donovan* v. *Daugherty,* 550 F. Supp. 390, 411 (S.D. Ala. 1982).

D. The Payment of Moving Expenses by the Profit Sharing Plan to Lee Optical, Inc.

19. In general, ERISA prohibits the leasing of any property between a plan and a party in interest. ERISA §406(a)(1)(A), 29 U.S.C. §1106(a)(1)(A). Special provisions, however, apply when the property involved is real estate owned by the plan and it is leased to an employee of the plan's participants. Such leases may be permitted, but only if they comply with a detailed set of protective provisions in ERISA §407, 29 U.S.C. §1107. Under ERISA §407(a), 29 U.S.C. §1107(a), a plan may not acquire or hold real property leased to an employer of the plan's participants, referred to as "employer real property", unless such property is "qualifying" within the meaning of section 407(d)(4). In addition, a plan may not acquire or hold qualifying employer real property if the aggregate fair market value of all such property held by the plan exceeds 10% of the fair market of all the plan's assets. The deadline, at section 407(a)(2), for compliance with the 10% holding rule was December 31, 1984. However, under §407(a)(4) and regulations promulgated by the Secretary at

29 C.F.R. §2550.407(a)(4), plans were required to divest themselves of 50% of the excess over the 10% limit by January 1, 1980.

20. As of December 31, 1979, the Profit Sharing Plan's lease of the Peerless Life Building to Dal-Tex, Inc., was a prohibited transaction under ERISA §§406(a)(1)(A), 406(a)(2) and 407(a), 29 U.S.C §§1106(a)(1)(A), 1106(a)(2) and 1107(a), because the fair market value of the property at that time and at all times previously, since January 1, 1975, exceeded ten percent of the total of the Profit Sharing Plan's assets, and because the Plan had failed to divest itself of 50 percent of the excess over 10 percent of its total assets that were invested in real property leased to the employers of the Plan's participants. As a result, the Plan could have declared the lease void and proceeded to evict Dal-Tex.

21. The Profit Sharing Plan fiduciaries, therefore, in causing the payment of $102,246 in moving expenses by the Profit Sharing Plan to Lee Optical, Inc., or one of its subsidiary corporations, as an inducement to cancel the lease, violated ERISA §§404(a)(1)(B) and 406(a)(1)(D), 29 U.S.C §§1104(a)(1)(B) and 1106(a)(1)(D), by acting imprudently and by causing the transfer of the Plan assets to a party in interest. Shanbaum, in his capacity as a trustee of the Plan, failed to make reasonable efforts under the circumstances to prevent or remedy this payment, in violation of ERISA §405(a)(1) and (3), 29 U.S.C. §1105(a)(1)(3). Shanbaum is therefore liable to the same extent as any other plan fiduciary would have been for the $102,246 paid by the Plan to Lee Optical.

E. Lindemann's Cross-Claim

22. Lindemann's Cross-Claim against Klepak for indemnity is not barred by any applicable statute of limitations.

23. Under the circumstances, Klepak possessed superior knowledge of the situation to that of Lindemann. For this

reason, because of his role as an attorney, and becuase, as between the two of them, Klepak, rather than Lindemann, ought to discharge any liability to Plaintiff, Klepak is obligated to indemnify Lindemann for all sums for which Lindemann may be liable to Plaintiff, except for the one-half of Lindemann's salary or $27,000.

F. Defendants' Affirmative Defenses

24. The Secretary of Labor's claims with regard to this transaction are not barred by the statute of limitations at section 413 of ERISA or other applicable statute of limitations. Defendants presented no credible evidence that the Department of Labor had actual knowledge of any of the violations alleged in the complaint three years or more before the initiation of this civil action.

25. Although the defendants also pled laches as an affirmative defense, laches is unavailable against an enforcement suite brought by the government. *E.g., Guaranty Trust Co.* v. *U.S.*, 304 U.S. 126, 130 (1938); *U.S.*, v. *Weintraub,* 613 F.2d 612, 618-19 (6th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980); *Weizman v. Dist. Eng., U.S. Army Corps of Eng.*, 526 F.2d 1302 (5th Cir. 1976), *United States v. State of Florida,* 482 F.2d 205 (5th Cir. 1973).

26. Defendants assert that plaintiff is estopped from challenging the transactions in this legal action because the Department of Labor was aware of and approved the terms of the transactions. Defendants, however, have failed to present credible evidence in support of this assertion and thus have failed to carry their burden of proof that the plaintiff is estopped.

27. Defendants Lindemann and Shanbaum claim that the Secretary is barred by the doctrines of election of remedies, estoppel by judgment, res judicata and waiver from seeking any relief in this lawsuit that was involved in, or could have been included in, the contempt proceedings in *Brock v. Shanbaum,*

No. CA3-80-0114. In the contempt proceedings, the Secretary unsuccessfully sought to establish that the property transfer was carried out in contempt of the terms of the Consent Order. The doctrines of election of remedies, estoppel by judgment, res judicata, and waiver do not bar this action. The doctrine of election of remedies does not apply here because the facts relied upon as the basis for the remedies sought in the instant case are not inconsistent with the facts relied upon in the contempt proceedings. *See Abdallah* v. *Abdallah*, 359 F.2d 170, 174-5 (3rd Cir. 1966). Moreover, this action is separate and distinct from the contempt proceedings, and is based on a different theory of law. Each case relied on theories or statutes that could not have been asserted in the other case. The present action is not barred by res judicata or estoppel by judgment simply because the same occurrences are involved in both cases. *See Stevenson* v. *International Paper Co.*, 516 F.2d 103, 108-111 (5th Cir. 1975). Similarly, plaintiff's initiation of the contempt proceedings did not constitute a waiver of the right to proceed against the defendants in a separate action under ERISA.

28. Defendants Lindemann and Shanbaum also claim that the plaintiff intentionally split his cause of action, and that he should be denied any relief because he does not have clean hands. A discussed above, however, plaintiff did not split his cause of action, but concurrently pursued two available consistent remedies to seek redress for the Plans' participants and beneficiaries. Thus, plaintiff does not have unclean hands in seeking equitable relief in this Court.

29. Finally, defendants Shanbaum and Lindemann claim that plaintiff, in agreeing to Lindemann's removal in 1983, without seeking further relief at that time, is now barred from asserting any claims that could have been asserted then. This defense is without merit. The Order Supplementing Consent Order, entered on April 4, 1983, contains no language releasing Lindemann or any other party from liability arising under

ERISA or any other law. Nothing in either the common law of trusts or ERISA requires that claims against a trustee be brought before the trustee leaves office.

G. Additional Remedies

30. In addition to the losses to the Plans for which the defendants are liable, the Court concludes that pre-judgment interest, based on the I.R.S. adjusted prime rate set by the Secretary of the Treasury, pursuant to 26 U.S.C. §6621, is appropriate in this case. *See Marshall v. Snyder,* 1 EBC 1878 (E.D.N.Y. 1979). Defendants shall therefore be ordered to pay such interest from the dates on which the relevant Plan losses were incurred until the date judgment is entered.

31. In addition to the restitution for which the Plans are liable, the Court concludes that, under the circumstances of this case, injunctive relief is appropriate. The Court concludes that the defendants should be permanently enjoined from acting as fiduciaries or service providers, either directly or indirectly, to any ERISA covered employee benefit plan.

Dated this 29th day of January 1987.

/s/ JERRY BUCHMEYER

Jerry Buchmeyer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM E. BROCK, Secretary of the United States Department of Labor, *Plaintiff,* vs. OSCAR C. LINDEMANN, *et al.*, *Defendants.*	CIVIL ACTION No. CA3-84-1814-R

FINAL JUDGMENT

This action came on for trial before the Court as to defendants Oscar Lindemann, Henry Klepak, and Theodore Shanbaum, the undersigned judge presiding. The issues having been duly tried, and a decision having been rendered pursuant to the Court's Findings of Fact and Conclusions of Law issued this date, it is hereby

ORDERED AND ADJUDGED that judgment be entered against defendants Oscar Lindemann, Henry Klepak and Theodore Shanbaum as follows:

1. Restitution

(a) Defendants Oscar Lindemann, Henry Klepak, and Theodore Shanbaum shall jointly and severally, within thirty (30) days of the entry of this Judgment, make restitution to the Lee Optical and Associated Companies Pension Plan, for the losses attributable to the transfer of the radio station and microwave system, in an amount equal to $1,510,839, which sum includes pre-judgment interest in the amount of $735,288.

(b) In addition to the amount set forth above, defendants Lindemann, Klepak and Shanbaum shall jointly and severally, within thirty (30) days of the entry of this Judgment, make restitution to the Lee Optical and Associated Companies Pension Plan, for the operating losses attributable to the radio station and microwave system, in the amount of $572,789, which sum includes pre-judgment interest in the amount of $225,275.

(c) In addition to the amounts set forth above, defendant Lindemann shall within thirty (30) days of the entry of this Judgment, make restitution to Lee Optical and Associated Companies Pension Plan, for one half of the salary he received, in the amount of $24,551, which sum includes pre-judgment interest in the amount of $11,051.

(d) In addition to the amounts set forth above, defendant Lindemann shall within thirty (30) days of the entry of this Judgment, make restitution to the Lee Optical and Associated Companies Profit Sharing Plan, for one half of the salary he received, in the amount of $24,551, which sum includes pre-judgment interest in the amount of $11,051.

(e) In addition to the amounts set forth above, defendant Henry Klepak shall, within thirty (30) days of the entry of this Judgment, make restitution to the Lee Optical and Associated Companies Pension Plan, for the salary he received, in the amount of $40,918, which sum includes pre-judgment interest in the amount of $18,418.

(f) In addition to the amounts set forth above, defendant Henry Klepak shall, within thirty (30) days of the entry of this Judgment make restitution to the Lee Optical and Associated Companies Profit Sharing Plan, for the salary he received, in the amount of $40,918, which sum includes pre-judgment interest in the amount of $18,418.

(g) In addition to the amounts set forth at (a) and (b) above, defendant Theodore Shanbaum shall make restitution to the Lee Optical and Associated Companies Profit Sharing Plan, for the moving expenses paid to Lee Optical, Inc., in the amount of $199,184, which sum includes pre-judgment interest in the amount of $96,938.

Henry Klepak shall indemnify Oscar Lindemann with regard to any amounts paid by Oscar Lindemann pursuant to (a) and (b), above.

Interest, computed pursuant to 28 U.S.C. §1961, shall accrue on any amounts of restitution or pre-judgment interest remaining unpaid after thirty days from the entry of this Judgment.

Although the Secretary of Labor brought this action, the above remedies are for the benefit of the Lee Optical and Assoicated Companies Pension and Profit Sharing Plans, and may also be enforced by the Trustee of the Plans.

2. Prospective Injunctions

Defendants Oscar Lindemann, Henry Klepak, and Theodore Shanbaum are hereby permanently enjoined from acting, either directly or indirectly, in any fiduciary capacity, and from furnishing or providing, either directly or indirectly, any service to any employee benefit plan covered by Title I of the Employee Retirement Income Security Act of 1974, (29 U.S.C. §§1001-1145).

3. Costs

In accordance with 28 U.S.C. §2421(a) and Rule 54(d), F.R.C.P., plaintiff's costs in conducting this litigation shall be taxed, jointly and severally, against defendants Oscar Lindemann, Henry Klepak and Theodore Shanbaum. Upon appropriate motion, the Court will determine an amount of costs to be taxed in favor of plaintiff.

DONE AND ORDERED in chambers at Dallas, Texas, this 29th day of January, 1987.

/s/ JERRY BUCHMEYER

Jerry Buchmeyer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM E. BROCK, Secretary of the United States Department of Labor,
Plaintiff,

vs.

OSCAR C. LINDEMANN, *et al.*,
Defendants.

CIVIL ACTION No. CA3-84-1814-R

AMENDED FINAL JUDGMENT

This action came on for trial before the Court as to defendants Oscar Lindemann, Henry Klepak, and Theodore Shanbaum, the undersigned judge presiding. The issues having been duly tried, and a decision having been rendered pursuant to the Court's Findings of Fact and Conclusions of Law issued this date, it is hereby

ORDERED AND ADJUDGED that judgment be entered against defendants Oscar Lindemann, Henry Klepak and Theodore Shanbaum as follows:

1. Restitution

(a) Defendants Oscar Lindemann, Henry Klepak, and Theodore Shanbaum shall jointly and severally, within thirty (30) days of the entry of this Amended Judgment, make restitution to the Lee Optical and Associated Companies Pension Plan, for the losses attributable to the transfer of the radio station and microwave system, in an amount equal to $1,510,839, which sum includes prejudgment interest in the amount of $735,288.

(b) In addition to the amount set forth above, defendants Lindemann, Klepak and Shanbaum shall jointly and severally, within thirty (30) days of the entry of this Amended Judgment, make restitution to the Lee Optical and Associated Companies Pension Plan, for the operating losses attributable to the radio station and microwave system, in the amount of $572,789, which sum includes pre-judgment interest in the amount of $225,275.

(c) In addition to the amounts set forth above, defendant Lindemann shall within thirty (30) days of the entry of this Amended Judgment, make restitution to Lee Optical and Associated Companies Pension Plan, for one half of the salary he received, in the amount of $24,551, which sum includes pre-judgment interest in the amount of $11,051.

(d) In addition to the amounts set forth above, defendant Lindemann shall within thirty (30) days of the entry of this Amended Judgment, make restitution to the Lee Optical and Associated Companies Profit Sharing Plan, for one half of the salary he received, in the amount of $24,551, which sum includes pre-judgment interest in the amount of $11,051.

(e) In addition to the amounts set forth above, defendant Henry Klepak shall, within thirty (30) days of the entry of this Amended Judgment, make restitution to the Lee Optical and Associated Companies Pension Plan, for the salary he received, in the amount of $40,918, which sum includes pre-judgment interest in the amount of $18,418.

(f) In addition to the amounts set forth above, defendant Henry Klepak shall, within thirty (30) days of the entry of this Amended Judgment, make restitution to the Lee Optical and Associated Companies Profit Sharing Plan, for the salary he received, in the amount of $40,918,

which sum includes pre-judgment interest in the amount of $18,418.

(g) In addition to the amounts set forth at (a) and (b) above, defendant Theodore Shanbaum shall, within thirty (30) days of the entry of this Amended Judgment, make restitution to the Lee Optical and Associated Companies Profit Sharing Plan, for the moving expenses paid to Lee Optical, Inc., in the amount of $199,184, which sum includes pre-judgment interest in the amount of $96,938.

Henry Klepak shall indemnify Oscar Lindemann with regard to any amounts paid by Oscar Lindemann pursuant to (a) and (b), above.

Pursuant to Interlocutory Judgments of this Court entered on February 10, 1986 (as to defendant Shanbaum) and February 22, 1986 (as to defendant Lindemann), the Estate of Ellis Carp shall indemnify defendants Shanbaum and Lindemann with regard to any amounts paid by these defendants under this Amended Judgment.

Interest, computed pursuant to 28 U.S.C. §1961, shall accrue on any amounts of restitution or pre-judgment interest remaining unpaid after thirty days from the entry of this Amended Judgment.

Although the Secretary of Labor brought this action, the above remedies are for the benefit of the Lee Optical and Associated Companies Pension and Profit Sharing Plans, and may also be enforced by the Trustee of the Plans.

2. Prospective Injunctions

Defendants Oscar Lindemann, Henry Klepak, and Theodore Shanbaum are hereby permanently enjoined from acting, either directly or indirectly, in any fiduciary capacity, and from furnishing or providing, either directly or indirectly, any service to any employee benefit plan covered by Title I of the

Employee Retirement Income Security Act of 1974, (29 U.S.C. §§1001 — 1145).

3. Costs

In accordance with 28 U.S.C. §2421(a) and Rule 54(d), F.R.C.P., plaintiff's costs in conducting this litigation shall be taxed, jointly and severally, against defendants Oscar Lindemann, Henry Klepak and Theodore Shanbaum. Upon appropriate motion, the Court will determine an amount of costs to be taxed in favor of plaintiff.

DONE AND ORDERED in chambers at Dallas, Texas, this 17th day of March, 1987.

/s/ JERRY BUCHMEYER

Jerry Buchmeyer
United States District Judge

Dennis E. WHITFIELD, Deputy Secretary of the United States Department of Labor, Plaintiff-Appellee,

v.

Oscar C. LINDEMANN and Henry Klepak, Defendants-Appellants,

Theodore Shanbaum, the Estate of Ellis Carp and Lee Optical, Inc., Defendants.

No. 87-1324.

United States Court of Appeals,
Fifth Circuit.

Sept. 9, 1988.

Labor Department instituted proceedings against current trustee of pension plan and his attorney alleging violations of fiduciary duty in connection with trustee's acceptance of overvalued assets from former trustees in settlement of trust's claims against former trustees. The United States District Court for the Northern District of Texas, Jerry Buchmeyer, J., found attorney and trustee jointly liable, granted trustee right of indemnity against attorney, set damages, and awarded prejudgment interest. On appeal, the Court of Appeals, Van Graafeiland, Circuit Judge, sitting by designation, held that: (1) attorney and trustee were jointly liable; (2) trustee was not entitled to complete indemnity from attorney; (3) actions of sophisticated trustee demonstrated he breached his fiduciary duty; (4) trustee and attorney were only liable for losses resulting from their breach; (5) if former trustees were insolvent, some of damages incurred by trust in receiving overvalued assets would not be recoverable from current trustee and his attorney; (6) operating losses of businesses which were transferred by former trustees to trust were not recoverable as separate damages; (7) in awarding prejudgment interest, Dis-

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trict Court should state its reasons; and (8) attorney defendant was not entitled to new trial.

Affirmed in part, reversed or vacated in part, and remanded.

1. Pensions ⇐ 49

Attorney of pension plan trustee, who later became general counsel of plan, was jointly liable with trustee for damages incurred by plan when it received former trustees' interest in businesses jointly owned by former trustees and plan at an inflated value to settle trustees' debts to plan under previous consent decree where sophisticated current trustee did not independently investigate value of the businesses; attorney was a nonfiduciary who knowingly participated in a breach of trust. Employee Retirement Income Security Act of 1974, §3(14)(A), (21)(A), 29 U.S.C.A. §1002(14)(A), (21)(A).

2. Pensions ⇐ 49

Trustee of pension plan was not entitled to complete indemnity from his personal attorney, who was later appointed general counsel for the plan, for losses incurred by plan, for which attorney and trustee were jointly liable, which were occasioned by plan's receipt of overvalued assets from former trustees to settle their indebtedness to plan under previous consent decree; at time sale occurred attorney was not yet attorney for the plan, and sophisticated trustee's failure to perform independent investigation of assets' value was a breach of his own fiduciary duty. Employee Retirement Income Security Act of 1974, §§404(a)(1)(A, B), 409, 29 U.S.C.A. §§1104(a)(1)(A, B), 1109.

3. Pensions ⇐ 49

Attorney's liability to pension plan, as a nonfiduciary who had knowingly participated in a breach of trust by the plan's trustee, was not limited to the amount of the attorney's personal

gain. Employee Retirement Income Security Act of 1974, §3(14)(A), (21)(A), 29 U.S.C.A. §1002(14)(A), (21)(A).

4. Pensions ⇐ 43

Failure of sophisticated trustee of pension plan, to independently value assets which trust was receiving in settlement of debts owed it by former trustees under consent decree, was a breach of the trustee's fiduciary duty. Employee Retirement Income Security Act of 1974, §404(a)(1)(A, B), 29 U.S.C.A. §1104(a)(1)(A, B).

5. Pensions ⇐ 49

Sophisticated trustee of pension plan and his attorney, nonfiduciary who participated in the breach of trust, were only jointly liable to trust for losses which were incurred and would not have been incurred but for their breach of trust; trustee, after failing to independently investigate value of assets, accepted them as complete settlement of debts owed to trust by former trustees under previous consent decree; however, total damanges suffered by trust would not be completely recoverable from the current trustee and his attorney if those assets were the only ones from which the trust could have hoped to have recovered its judgment, due to the former trustees' insolvency. Employee Retirement Income Security Act of 1974, §404(a)(1)(A, B), 29 U.S.C.A. §1104(a)(1)(A, B).

6. Trusts ⇐ 234

Trustee is not liable for loss resulting from the breach of the trust if the same loss would have been incurred if he had committed no breach.

7. Pensions ⇐ 49

Trustee of pension plan and his personal attorney, nonfiduciary who knowingly participated in a breach of trust, met their burden and demonstrated that portion of loss incurred by trust,

due to trustee's failure to independently value assets received by trust in complete settlement of consent decree judgment from the plan's former trustees, would have occurred despite the breach; assets received by the trust, though overvalued, were sole assets owned by the former trustees from which the trust could have expected satisfaction of the judgment.

8. Pensions ⇐ 49

Pension plan was not entitled to receive as damages from current trustee and his attorney, nonfiduciary who knowingly participated in a breach of trust, the projected losses which the plan would have to pay to operate asset businesses received in complete settlement of consent decree judgment from former trustees, caused by the overvaluation of the asset businesses; where businesses were valued by taking into account their future profits and losses; plan could not recover twice for the businesses' future losses.

9. Pensions ⇐ 49

Pension plan would not be able to recover as damages from current trustee and his attorney, nonfidicuary who knowingly participated in breach of trust, losses which would stem from operation of assets, operating businesses, which were transferred in part from former trustees in complete settlement of the former trustees' liability to the trust under a previous consent decree judgment if the former trustees were otherwise insolvent as alleged by the current trustee and his attorney, where former trustees and trust were joint venturers in the operation of the transferred asset businesses, as trust would have, as a joint venturer, had to pay those operating expenses regardless of the transfer.

10. Interest ⇐ 39(2.5)

When district court exercises its descretion and awards prejudgment interest, it should briefly state its reason to assist appellate review.

11. Interest ⇐ 39(2.10)

Absent statutory mandate, award of prejudgment interest is discretionary with the trial court.

12. Interest ⇐ 39(2.5)

Prejudgment interest is not awarded as a penalty against defendant, but as compensation for use of funds.

13. Interest ⇐ 39(2.20)

Lack of proof, that pension plan was in business of borrowing or lending money, that current trustee of plan or his attorney had received interest-free use of money belonging to plan, or proof which demonstrated the rate of income plan received on its investments, undermined district court's award of prejudgment interest on loss occasioned by trustee's failure to individually investigate value of assets received in complete settlement of trust's consent decree judgment against former trustees; reason for award of prejudgment interest was not apparent from record.

14. Federal Civil Procedure ⇐ 2332

Defendant, attorney of pension plan trustee and a nonfiduciary found liable for damages incurred by trust for his knowing participation in trustee's breach of trust, was not entitled to new trial simply because he was elderly and in ill health and thus did not acquit himself well as a witness during the proceedings; district court was in best position to observe defendant's demeanor, and did not abuse its discretion in refusing new trial motion.

15. Judgment ⇐ 646

Previous refusal of district court judge, to find current trustee and former trustees of pension plan in contempt of previous consent decree which had set former trustees' liability to plan, was not res judicata to later claim for damages incurred

by plan through trustee's breach of his fiduciary duty by failing to independently investigate value of assets trust received in complete settlement of the consent decree judgment and had led to the contempt petition; opinion of Court of Appeals which affirmed the refusal to cite for contempt, specifically stated that parties could be independently held liable for their breach of duties.

Appeals from the United States District Court for the Northern District of Texas.

Before VAN GRAAFEILAND,* JOHNSON AND JOLLY, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

Oscar Lindemann and Henry Klepak appeal from a judgment of the United States District Court for the Northern District of Texas, Dallas Division, which followed a nonjury trial before Judge Buchmeyer. The other named defendants are not parties to the appeal. The action against Lee Optical, Inc. was dismissed by stipulation. The Estate of Ellis Carp permitted judgment to be taken against it by default. Theodore Shanbaum withdrew his appeal from the judgment entered against him and the appealing defendants.

The factual setting for the litigation may be summarized briefly. In 1951, Lee Optical, Inc. created a Pension Plan and a Profit Sharing Plan. Dal-Tex, Inc., a wholly-owned subsidiary of Lee Optical, was a sponsoring employer of the Plans, which were non-contributory. Shanbaum and Carp were the principal shareholders of Lee Optical, and they served as trustees of the two Plans. Among the investments they made for the Pension Plan was the purchase of a one-third interest in Grayson Enterprises, Inc., the remaining two-thirds of which was owned by Shanbaum and Carp. In 1981, Grayson was dissolved, and

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* Circuit Judge of the Second Circuit, sitting by designation.

its assets were transferred to a joint venture known as SCP which, as its name indicates, also was owned one-third each by Shanbaum, Carp and the Pension Plan.

In 1980, the then Secretary of Labor, Ray Marshall, sued Shanbaum, Carp, Lee Optical and Dal-Tex, alleging violations of ERISA, 29 U.S.C. §§1001 *et seq.* Included among them were the making of improper loans by the Plans to the defendant companies and the failure to enforce payment of rent, claims and loans in default. Such actions by the Secretary are authorized by 29 U.S.C. §1132(a)(2). Henry Klepak, a 75-year old Dallas attorney who had represented Shanbaum, Carp and Lee Optical for many years, represented the defendants in that litigation.

On September 24, 1981, the 1980 action was settled with the signing of a Consent Order by Judge Higginbotham. Under the terms of the order, Shanbaum, the sole surviving trustee of the Plans, was discharged, and the defendant Lindemann was appointed as his successor. The order also provided in substance that Dal-Tex would pay interest due and owing the Profit Sharing Plan in the amount of $102,406.31 and interest and principal due and owing the Pension Plan in the amount of $1,058,986.07. If Dal-Tex did not make the payments within six months, Shanbaum and Carp were to be held jointly and severally responsible for making them. Shanbaum and Carp were given the option of offering the new trustee property or other assets of equivalent value in lieu of cash, and the trustee was authorized to accept it if he determined that its value was equivalent to the amounts owed and the propsed transaction would be in the best interests of the Plans.

It quickly became obvious that Dal-Tex could not pay its obligations to the Plans, and the burden of making payment fell on Shanbaum and Carp. So far as can be determined from the record, the only asset of any substance which they could offer the new trustee was their two-thirds interest in SCP, which owned a radio station in Honolulu, Hawaii, and a microwave

telecommunications system in Oklahoma and Texas. Within hours of his appointment as trustee, Lindemann agreed to accept Shanbaum's and Carp's two-thirds interest in these two properties in full satisfaction of their indebtedness. For purposes of the transfer, the radio station was assigned a value of $950,000, and the microwave system was given a value of $1,338,927. The value of Shanbaum's and Carp's two-thirds interest then was computed to be $1,525,951. Because the total amount due the two Plans under the Consent Order was $1,161,392.38, the parties calculated that there had been an overpayment of $364,558.96, and this amount was repaid by the Pension Plan to SCP. The Pension Plan also paid the Profit Sharing Plan the $102,406.31 that was owed to it. Lindemann agreed to the transfer and the calculations relying solely on Klepak's erroneous assurances that they had been approved by all parties to the Consent Order and the district court prior to Lindemann's appointment. Lindemann never saw an appraisal of either property before accepting the transfer and, of course, made no personal determination as to their value. This litigation followed.

Accepting appraisals submitted by the Secretary and rejecting those submitted by the defendants, the district court found that the property had been overvalued by $775,551.[1] The district court also found that the radio station and microwave system suffered operating losses of $347,514 during the first year of the Pension Plan's ownership. The district court held that because of Lindemann's "total abdication of fiduciary responsibility", he was liable for the overpayment and the operating losses but gave him a right of recovery over against Klepak. The court also held that both Shanbaum and Klepak

[1] Defendants' expert appraiser evaluated the radio station at $1,018,000, but the district court rejected this figure because the appraiser had not taken into account that a portion of the station's property was leased rather than owned and because the appraiser assumed a sale on "attractive terms". The district court also rejected defendants' $1,338,927 appraisal of the microwave system because it was made in 1979, two years prior to the transfer.

were liable as knowing and active participants in Lindemann's breach of fiduciary duty. Judgment was entered against Lindemann, Shanbaum and Klepak for $2,083,628, of which $1,123,065 represented the total of the overvaluation and the operating losses and $960,563 represented prejudgment interest. The defendants also were required to make restitution in whole or in part for compensation they had received from the Plans. Other portions of the judgment are not of concern to us on this appeal.

[1, 2] The district court's decision to hold Klepak jointly liable with Lindemann, the named trustee, was correct and is affirmed. However, we reverse the district court's holding that Lindemann is entitled to complete indemnity against Klepak because of Klepak's "superior knowledge of the situation", because of "his role as an attorney", and because "as between the two of them, Klepak rather than Lindemann, ought to discharge any liability to Plaintiff."

The ambiguous phrase "his role as an attorney" needs some explanatory factual background. The district court found that "shortly" after Lindemann's appointment as trustee, he "signed an agreement with Klepak, on behalf of the Plans, for Klepak to serve as their attorney." The district court also found that "on or about September 28, 1981, Lindemann authorized his own compensation as trustee at $3,000 per month", and "at the same time he set his own compensation", Lindemann hired Klepak as general counsel. The written "Employment Agreement", referred to by the district court, is dated September 28, 1981, and provides that the term of the Agreement is for a period beginning October 1, 1981 and terminating September 30, 1985.

Lindemann signed the agreement for transfer of the radio station and microwave system within hours of his appointment on September 24, 1981. Klepak had been the attorney for Shanbaum and Carp for many years and represented them in the litigation leading to the Consent Order. Our reading of the

record satisfies us that he had not yet become the attorney for the Plans when the transfer agreement was signed on September 24, 1981. However, although Klepak was not a statutory fiduciary under 29 U.S.C. §§1002(14)(A) and (21)(A), *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir.1988), he was, as the district court held, jointly liable with Lindemann as a nonfiduciary who knowingly participated in a breach of trust. *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir.1988); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir.1987); *Foltz v. U.S. News & World Report, Inc.*, 627 F.Supp. 1143, 1167-68 (D.D.C.1986); *Donovan v. Daugherty*, 550 F.Supp. 390, 410-11 (S.D. Ala.1982).

[3] We reject Klepak's argument that his liability should be limited to the amount of his personal gain. Although there are some dicta in the cases to this effect, *e.g., Fremont v. McGraw-Edison Co.*, 606 F.2d 752, 759 (7th Cir.1979), *cert. denied*, 445 U.S. 951, 100 S.Ct. 1599, 63 L.Ed.2d 786 (1980); *McDougall v. Donovan*, 539 F.Supp. 596, 599 n. 6 (N.D.Ill.1982); *Donovan v. Daugherty, supra*, 550 F.Supp. at 411, most courts that have considered the issue on the merits hold to the contrary, *e.g., Foltz v. U.S. News & World Report, Inc., supra*, 627 F.Supp. at 1167-68; *Wisconsin Real Estate Investment Trust v. Weinstein*, 509 F.Supp. 1289, 1299—1300 (E.D.Wis.1981); *Heit v. Bixby*, 276 F.Supp. 217, 230 (E.D.Mo.1967).

[4] Having said that, we hasten to add that we see no basis for holding that Klepak should indemnify Lindemann, the named trustee, for Lindemann's liability arising out of his own blatant breach of trust. When Lindemann became trustee of the Pension Plan on September 24, 1981, he assumed rigorous obligations and duties, not only under general principles of law, *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-74, 105 S.Ct. 2833, 2840-42, 86 L.Ed.2d 447 (1985), but also as specifically prescribed in Judge Higginbotham's Consent Order. The

district court found that Lindemann acted in complete disregard of that order and in violation of sections 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. §§1104(a)(1)(A) and (B), by acting imprudently and not solely in the interests of the Plans' participants and beneficiaries. The court also concluded that Lindemann made no independent investigation of the values of the properties or of their suitability as Plan investments before accepting them and that "[h]is utter reliance on the representations of those who have no expertise in the relevant field and who are not in a position to provide independent advice was not consistent with the responsibilities of a fiduciary."

We need not decide whether the scope of equitable relief available under 29 U.S.C. §1109 and general principles of trust law, which permit indemnification as between co-trustees where their fault is greatly disproportionate, *see Free v. Briody,* 732 F.2d 1331, 1336-38 (7th Cir.1984), authorize indemnification as between a trustee and a nonfiduciary participant. Such indemnification would not be proper here. In his role as trustee, Lindemann, a sophisticated businessman, owed the primary responsibility to the Plan. To say that he was derelict in the performance of his duties is to put it mildly. The benefits which ERISA was intended to achieve, and equitable principles as well, would be ill-served if trustees such as Lindemann could avoid all liability for their derelictions by transferring such liability to the shoulders of others who, at best, could only have participated in the trustees' wrongdoing. We conclude that the district court clearly erred in ordering such indemnification in the instant case. *See Duckett v. National Mechanics' Bank,* 86 Md. 400, 403, 38 A. 983, 984 (1897); *Masonic Bldg. Corp. v. Carlsen,* 128 Neb. 108, 258 N.W. 44, 55 (1934).

[5] Having determined the allocation of the Pension Plan's losses, we now consider the correctness of the amounts allowed. Trial of this action began on January 12, 1987 and concluded at 1:30 p.m. the following day. At the opening of the trial on January 12, counsel for the Secretary filed proposed

Findings of Fact and Conclusions of Law. This is a prolix document, twenty-eight pages in length, which reads more like an opinion than what it purports to be. It even sets the prejudgment rate of interest to be charged on the recoveries it prescribes, *i.e.,* the IRS adjusted prime rate set by the Secretary of the Treasury pursuant to 26 U.S.C. §6621. However, it contains no mention whatever of the financial status of Shanbaum and Carp, their lack of any assets other than the radio station and microwave system with which to make the payments required by the Consent Order. The district court's findings and conclusions, most of which are word for word those of the Secretary, *see James v. Stockham Valves and Fittings Co.,* 559 F.2d 310, 314 n. 1 (5th Cir.1977), likewise omit all reference to this evidence.

Examination of the record discloses that both Klepak and Shanbaum testified repeatedly that Shanbaum and Carp had no such assets. *E.g.:*

> A. Well, Judge, I can tell you this: There were no other assets available of any kind or character. That is all we had to offer him. That is what we offered him and that's what he got.
>
> Q. You've told me that several times before. (Klepak's examination by the court at 296)
>
> * * * * * *
>
> I knew they were having trouble and I knew there wasn't a Chinaman's chance for them to ever get a dime out of Dal-Tex. I figured the only way Ted [Shanbaum] could pay and Carp could pay was . . . by the conveyance of the only assets that they had. (Klepak's testimony at 266)
>
> * * * * * *
>
> Q. Did you at the time that these properties were transferred have sufficient funds in your personal possession or assets in your possession other than your interest in the microwave

system and the radio station that you could have transferred to the trust to comply with the terms of the Consent Order?

A. No, sir.

Q. To your knowledge did Dr. Carp?

A. No, sir.

Q. What about Dal-Tex?

A. Dal-Tex was in Chapter 11 bankruptcy. (Testimony of Shanbaum at 166)

This testimony is supported implicitly by the manner in which Shanbaum and Carp responded to the claims against them. Dr. Carp, and his estate following his death, failed to even interpose a defense, thus letting judgment be entered against them by default. Shanbaum failed to prosecute an appeal to this Court from the $2 million judgment entered against him. Shanbaum is appealing only the order permitting the Pension Plan to withhold his monthly payments, because, other than his social security, these payments constitute this over-70-year-old man's sole means of support. *See Herberger v. Shanbaum,* No. 87-1556, Slip op. p. —, — F.2d —. This virtually undisputed evidence concerning lack of resources is crucially important.

[6] Section 212, comment e, of the *Restatement (Second) of Trusts* provides that a "trustee is not liable for a loss resulting from the breach of trust if the same loss would have been incurred if he had committed no breach of trust." Put another way, "If the trustee commits a breach of trust and if a loss is incurred the trustee may not be chargeable with the amount of the loss if it would have occurred in the absence of a breach of trust." *Id.* §205, comment f. These comments find support in the cases. *See, e.g., Shriners Hospitals for Crippled Children v. Gardiner,* 152 Ariz. 519, 523, 733 P.2d 1102, 1106 (1986); *Fort Myers Memorial Gardens, Inc. v. Barnett,* 474 So.2d 1215, 1218 (Fla.App. 2d Dist.1985); *Seven G. Ranching Co. v. Stewart*

Title & Trust, 128 Ariz. 590, 592, 627 P.2d 1088, 1090 (1981); *Estate of Stetson,* 463 Pa. 64, 84, 345 A.2d 679, 690 (1975). *See also* Bogert, *Trusts and Estates* §§592 at 410-11 and 862 n. 40 (2d ed. 1979) and III Scott, *The Law of Trusts* §205.1 at 1673 (3d ed. 1967).

[7] The authorities are not in accord with regard to the burden of proof on the issue of causal relation. The cases cited in the preceding paragraph hold that, once the existence of a loss has been established, the burden is on the trustee to show that there was no causal relation between his breach and the loss, *i.e.,* that the loss would have occurred regardless of the breach. However, there also is authority that it is the plaintiff's duty to prove a causal connection between the breach and the loss, particularly where the party sought to be held is not a named trustee. *E.g., United States Life Ins. Co. v. Mechanics & Farmers Bank,* 685 F.2d 887, 895-97 (4th Cir.1982); *Leigh v. Engle,* 727 F.2d 113, 137 (7th Cir.1984); *Brandt v. Grounds,* 687 F.2d 895, 898 (7th Cir.1982). Assuming that the burden of proof is on the defendants in the instant case, the record as it presently stands satisfies us that, except for the overpayment of $243,038[2] which the Pension Plan made to SCP, they have met this burden. Indeed, if other issues in the case did not require a remand in any event, we would be inclined to hold in favor of the defendants on this point without remanding to the district court for further findings. *See Kratzer v. Capital Marine Supply, Inc.,* 645 F.2d 477, 483 (5th Cir.1981); *Tomlin v. Ceres Corp.,* 507 F.2d 642, 648 n. 2 (5th Cir.1975); *see also Canadian Transport Co. v. Irving Trust Co.,* 548 F.2d 53, 55 (2d Cir.1977).

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[2] Although the district court held that the Plan had made an overpayment of $364,558.96 to SCP, it apparently overlooked the fact that SCP was one-third owned by the Plan. The actual overpayment, therefore, should have been reduced by one-third to $243,038. It is conceded that Shanbaum took $125,000 of this amount for his personal use. Appellants contend, however, that the remainder was applied to the operating cost of the radio station while the parties were waiting for FCC approval of the transfer. The district court had no reason to hold that this vague assertion negated the Plan's claim of loss.

Insofar as this item of damage is concerned, we direct that the district court on remand give the Secretary an opportunity to meet the defendants' proof concerning the lack of available assets and then make specific findings as to whether Shanbaum and Carp had any assets, other than the radio station and microwave system, that could have been used to satisfy Judge Higginbotham's Consent Order. If they had no other assets, the fact, as the district court found, that the two properties were transferred at an inflated value, did not harm the Pension Plan, except as the inflated values led to the $243,038 repayment. "If trustees act imprudently, but not dishonestly they should not have to pay a monetary penalty for their imprudent judgment so long as it does not result in a loss to the Fund." *Brock v. Robbins,* 830 F.2d 640, 647 (7th Cir.1987). Should the district court find that other assets were available for payment to the Plan, the damage figure of $243,038 may be increased by an amount representing such available assets until the total amount of the unpaid balance of the Consent Order has been reached.

[8] We also are troubled by the district court's allowance of over $300,000 in operating losses. Both of the Secretary's appraisal experts used the cash flow method in evaluating the transferred properties. Using this method, the experts projected revenues, operating expenses, and capital expenditures some five or ten years into the future. These figures then were combined into a profit and loss statement to arrive at a net cash flow which was capitalized and discounted to arrive at the current cash value. *See Matter of Valuation Proceedings,* 531 F.Supp. 1191, 1225 (Regional Rail Reorg.Ct.1981). Once a current valuation was fixed by taking projected profits and losses into account, the Plan was not entitled to recover the discounted losses a second time.

[9] Moreover, it is hornbook law that only such damages should be awarded as will place the injured party in the situation it would have occupied had the wrong not been

committed. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975) (quoting *Wicker v. Hoppock,* 6 Wall. 94, 99, 18 L.Ed. 752 (1867)); *Freeport Sulphur Co. v. S/S Hermosa,* 526 F.2d 300, 304 (5th Cir.1976). The law will not put the injured party in a better position. *Missouri Pacific R.R. v. H. Rouw Co.,* 258 F.2d 445, 447 (5th Cir. 1958). The wrong asserted in the instant case was not the transfer of the properties—transfer was authorized in Judge Higginbotham's Consent Order — the wrong was the excessive credit allowed for the properties. Had the properties been evaluated properly when they were transferred, the same operating losses would have occurred. To allow recovery for those losses, as the district court has done, is to place the Plan in a better position than it would have occupied had the wrong not occurred.

Finally, as a co-venturer in SCP, the Pension Plan would have been jointly and severally responsible for the liabilities inherent in the losses even if the radio station and microwave system had not been transferred. If, as defendants contend, Shanbaum and Carp were insolvent, the Plan, which then would have been the sole solvent owner, might have borne the burden of the losses in any event.

[10] The last troublesome item which requires discussion is the prejudgment interest award which totals almost $1 million. Judge Higginbotham's Consent Order provided that, insofar as the $1,058,986.07 balance of principal and interest on the promissory note from Dal-Tex to the Pension Plan was concerned, "interest shall accrue on the unpaid balance at the rate of ten (10%) percent per annum from the date of entry of this Order until the date of final payment." However, as noted above, the Secretary's proposed Findings of Fact and Conclusions of Law included the following proposed "Additional Remedy":

In addition to the losses to the Plans for which the defendants are liable, the Court concludes that pre-judgment

interest, based on the I.R.S. adjusted prime rate set by the Secretary of the Treasury, pursuant to 26 U.S.C. §6621 is appropriate in this case.

No evidence was offered as to why this rate was "appropriate", and the district court did not enlighten us. Its sole reference to the Secretary's proposal was "Also would accept the conclusion . . . that prejudgment interest is recoverable on these claims." During most of 1982, the section 6621 rate was 20 percent simple interest, and after January 1, 1983 it began to be compounded at daily rates as high as 16 percent. Section 207 of the *Restatement (Second) of Trusts* provides that, as a general rule, a trustee will not be charged with compound interest unless he has received compound interest or profit equivalent thereto or it was his duty to accumulate income. The damage award exclusive of interest totaled $1,123,665. Interest at a flat rate of 10 percent from September 24, 1981 to the day of judgment, January 29, 1987, would have been approximately $598,559. The interest actually awarded totaled $960,563.

[11] Absent statutory mandate, the award of prejudgment interest generally is discretionary with the trial court. *Katsaros v. Cody,* 744 F.2d 270, 281 (2d Cir.), *cert. denied,* 469 U.S. 1072, 105 S.CT. 565, 83 L.Ed.2d 506 (1984); *Bricklayers' Pension Trust Fund v. Taiariol,* 671 F.2d 988, 990 (6th Cir.1982). However, the somewhat cursory manner in which the district court accepted the Secretary's proposed "Additional Remedy" makes it difficult to weigh the propriety of the district court's exercise of discretion.

[12, 13] Prejudgment interest is not granted "according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness." *Blau v. Lehman,* 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403 (1962) (quoting *Board of County Commissioners v. United States,* 308 U.S. 343, 352, 60 S.Ct. 285, 289, 84 L.Ed. 313 (1939)); *see Huddleston v. Herman & MacLean,* 640 F.2d 534, 560 (5th

Cir.1981). It is not awarded as a penalty, but as compensation for the use of funds. *Socony Mobil Oil Co. v. Texas Coastal and International, Inc.,* 559 F.2d 1008, 1014 (5th Cir.1977). There was no proof in the instant case that the Pension Plan was in the business of borrowing or lending money or that it paid or received any specified rate of interest. *See Sabine Towing and Transportation Co. v. Zapata Ugland Drilling, Inc.,* 553 F.2d 489, 491 (5th Cir. 1977). There was no proof as to the rate of income it received on its investments. Neither Lindemann nor Klepak enjoyed the interest-free use of money belonging to the Pension Plan. *See Pension Benefit Guaranty Corp. v. Greene,* 570 F.Supp. 1483, 1503 (W.D.Pa. 1983). If the instant case is appealed again to this Court following the remand we now order, we will be greatly assisted in reviewing the district court's discretionary allowance of section 6621 prejudgment interest if it is accompanied by a brief statement of reasons. *See Sargeant v. Sharp,* 579 F.2d 645, 647 (1st Cir.1978); *Farmington Dowel Products Co. v. Forster Mfg. Co.,* 436 F.2d 699, 701 (1st Cir.1970).

[14, 15] Other contentions of appellants can be disposed of without discussion. Although Klepak was an elderly man in poor health and did not acquit himself well as a witness, the district judge who was in the best position to observe his demeanor did not abuse his discretion in refusing to grant Klepak's motion for a new trial. The refusal of the district court in a prior proceeding before Judge Fish to hold Lindemann, Shanbaum and Carp in contempt of court for failure to comply with Judge Higginbotham's Consent Order is not *res judicata* as to the claims asserted in the instant case. Indeed, this Court, in affirming Judge Fish's order, stated specifically that our affirmance should not be read to suggest that defendants might not be held liable for breach of duties under ERISA or for other reasons. The district court did not abuse its discretion in requiring Lindemann and Klepak to reimburse the Plans for compensation which they had received. III Scott, *The Law of*

Trust §243 (3d ed. 1967). However, for the reasons above stated, Lindemann is not entitled to be indemnified by Klepak for the amount he repays.

Our disposition of the issues presented on this appeal is as follows:

1. We affirm that portion of the judgment below which holds Lindemann and Klepak jointly and severally liable for losses sustained by the Pension Plan and directs reimbursement of compensation received.

2. We reverse that portion of the judgment which gives Lindemann a right of recovery over against Klepak.

3. We vacate the damage award based on the property evaluations and remand to the district court for a determination as to whether Shanbaum and Carp had any assets other than the radio station and microwave system that could have been used to satisfy Judge Higginbotham's Consent Order. If they had none, the award of damages based on overvaluation of the properties must be reduced to $243,038. If the district court determines that other assets were available, the $243,038 figure may be increased by an amount representing the value of such assets until the unpaid balance of the amount due and owing under the Consent Order has been reached.

4. The award of $347,514 for operating losses is vacated.

5. If the district court again adopts the section 6621 prejudgment rate of interest, it should explain why it does so.

The remainder of appellants' arguments have been carefully considered, and they are rejected. The judgment is

AFFIRMED IN PART, REVERSED OR
VACATED IN PART and REMANDED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 87-1324

DENNIS E. WHITFIELD, Deputy Secretary
of Labor of the United States
Department of Labor,

Plaintiff-Appellee,

versus

OSCAR C. LINDEMANN and
HENRY KLEPAK,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(OCTOBER 14, 1988)

Before VAN GRAAFEILAND,*, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

* Circuit Judge of the Second Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON

Sam Johnson
United States Circuit Judge

SUBTITLE A—GENERAL PROVISIONS

§1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the coninued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of

plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

(Pub.L. 93-406, Title I, §2, Sept. 2, 1974, 88 Stat. 832.)

§1001a. Additional Congressional findings and declaration of policy

(a) Effects of multiemployer pension plans

The Congress finds that —

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) Modification of multiemployer plan termination insurance provisions and replacement of program

The Congress further finds that —

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-

based benefit protection program that will enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

(c) Policy

It is hereby declared to be the policy of this Act —

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

(Pub.L. 96-364, §3, Sept. 26, 1980, 94 Stat. 1209.)

§1002. DEFINITIONS

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal

Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental

Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. §§1331-1343).

(11) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947 [29 U.S.C.A. §141 et seq.] or the Railway Labor Act [45 U.S.C.A. §151 et seq.]

(13) The term "Secretary" means the Secretary of Labor.

(14) The term "party in interest" means, as to an employee benefit plan —

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of —

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of —

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of Title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

(15) The term "relative" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

(16)(A) The term "administrator" means —

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may be regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(17) The term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(18) The term "adequate consideration" when used in part 4 of subtitle B of this subchapter means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 78f of Title 15, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

(20) The term "security" has the same meaning as such term has under section 77b(1) of Title 15.

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. §80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to —

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title.

method. The terminal funding cost method and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 [45 U.S.C.A. §231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C.A. §288 et seq.].

(33)(A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26.

(B) The term "church plan" does not include a plan —

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades

or businesses (within the meaning of section 513 of Title 26), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph —

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes —

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of Title 26 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan —

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of Title 26) at the time of such separation from service.

(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements

of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means —

(I) the period ending 270 days after the date of mailing by the Secretary of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary determines is reasonable or necessary for the correction of the default, whichever has the latest ending date.

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant —

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

(36) The term "excess benefit plan" means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of Title 26 on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

(37)(A) The term "multiemployer plan" means a plan —

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

(B) For purposes of this paragraph, all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 1301(b)(1) of this title are considered a single employer.

(C) Notwithstanding subparagraph (A), a plan is a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding its termination date.

(D) For purposes of this subchapter, notwithstanding the preceding provisions of this paragraph, for any plan year which

began before September 26, 1980, the term "multiemployer plan" means a plan described in this paragraph (37) as in effect immediately before such date.

(E) Within one year after September 26, 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the corporation and subject to the provisions of sections 1453(b) and (c) of this title, that the plan shall not be treated as a multiemployer plan for all purposes under this chapter or Title 26 if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980 —

(i) the plan was not a multiemployer plan because the plan was not a plan described in subparagraph (A)(iii) of this paragraph and section 414(f)(1)(C) of Title 26 (as such provisions were in effect on the day before September 26, 1980); and

(ii) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the Secretary of Labor and the Secretary of the Treasury.

(38) The term "investment manager" means any fiduciary (other than a trustee or named fiduciary, as defined in section 1102(a)(2) of this title) —

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who is (i) registered as an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C.A. §80b-1 et seq.]; (ii) is a bank, as defined in that Act; or (iii) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

(39) The terms "plan year" and "fiscal year of the plan" mean with respect to a plan, calendar, policy, or fiscal year on which the records of the plan are kept.

(40)(A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained —

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or

(ii) by a rural electric cooperative.

(B) For purposes of this paragraph —

(i) two or more trades or businesses, whether or not incorporated shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term "control group" means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 1301(b) of this title, except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent, and

(iv) the term "rural electric cooperative" means —

(I) any organization which is exempt from tax under section 501(a) of Title 26 and which is engaged primarily in providing electric service on a mutual or cooperative basis, and

(II) any organization described in paragraph (4) or (6) of section 501(c) of Title 26 which is exempt from tax under section 501(a) of such Title 26 and at least 80 percent of the members of which are organizations described in subclause (I).

(Pub L. 93-406, Title I, §3, Sept. 2, 1974, 88 Stat. 833; Pub.L. 96-364, Title III, §§302, 305, Title IV, §§407(a), 409, Sept. 26, 1980, 94 Stat. 1291, 1294, §303, 1307; Pub.L. 97-473, Title III, §302(a), Jan. 14, 1983, 96 Stat. 2612.)

§1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances is a clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provision of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) —

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Pub.L. 93-406, Title I, §404, Sept. 2, 1974, 88 Stat. 877; Pub.L. 96-364, Title III, §309, Sept. 26, 1980, 94 Stat. 1296.)

§1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or

represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

(Pub.L. 93-406, Title I, §406, Sept. 2, 1974, 88 Stat. 879.)

§1108. Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is —

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees, officers, or shareholders in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if —

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if —

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is —

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers

for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) doe not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if —

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if —

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company.[1] or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III of this chapter.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

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[1] So in original. The period probably should be a comma.

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from —

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Owner-employees; family members; shareholder employees

Section 1107(b) of this title and subsections (a), (b), (c), and (e) of this section shall not apply to any transaction in which a plan, directly or indirectly —

(1) lends any part of the corpus or income of the plan to;

(2) pays any compensation for personal services rendered to the plan to; or

(3) acquires for the plan any property from or sells any property to;

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of Title 26), a member of the family (as defined in section 267(c)(4) of Title 26) of any such owner-employee, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation. For purposes of this subsection a shareholder employee (as defined in section 1379 of Title 26 as in effect on the day before the date of the enactment of the Subchapter S Revision Act of 1982) and a participant or beneficiary of an individual retirement account, individual retirement annuity, or an individual retirement bond (as defined in section 408 or 409 of Title 26) and an employer or association of employers which establishes such an account or annuity under section 408(c) of Title 26 shall be deemed to be an owner-employee.

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title) —

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if —

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

(f) Applicability of statutory prohibitions to mergers or transfers

Section 1106(b)(2) of this title shall not apply to any merger or transfer described in subsection (b)(11) of this section.

(Pub.L. 93-406, Title I, §408, Sept. 2, 1974, 88 Stat. 883; Pub.L. 96-364, Title III, §308, Sept. 26, 1980, 94 Stat. 1295; Pub.L. 97-354, §5(a)(43), Oct. 19, 1982, 96 Stat. 1697.)

§1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was com-

mitted before he became a fiduciary or after he ceased to be a fiduciary.

(Pub.L. 93-406, Title I, §409, Sept. 2, 1974, 88 Stat. 886.)

§1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respct[1] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if —

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day

[1] So in original. Probably should be "respect".

from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against any employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation

shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(Pub.L. 93-406, Title I, §502, Sept. 2, 1974, 88 Stat. 891; Pub.L. 96-364, Title III, §306(b), Sept. 26, 1980, 94 Stat. 1295.)

§1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev. Stat. §§393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section —

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the

State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section —

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides —

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

(Pub.L. 93-406, Title I, §514, Sept. 2, 1974, 88 Stat. 897; Pub.L. 97-473, Title III, §§301(a), 302(b), Jan. 14, 1983, 96 Stat. 2611, 2613; Pub.L. 98-397, Title I, §104(b), Aug. 23, 1984, 98 Stat. 1436.)

No. 88-1271

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

HENRY KLEPAK, PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, a non-fiduciary attorney who knowingly and actively participated in fiduciary breaches committed by the trustee of an employee benefit plan, was properly held liable under the Employee Retirement Income Security Act for the losses that the plan sustained as a result of the breaches.

2. Whether petitioner was properly required to return the salary he received from the plan when one of the fiduciary breaches in which he participated involved his advice to the trustee to enter into an unreasonable compensation agreement for his legal services.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Blankenship v. *Boyle*, 329 F. Supp. 1089 (D.D.C. 1971) .. 10
Blessitt v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988) 13
Brock v. *Gerace*, 635 F. Supp. 563 (D.N.J. 1986) 8, 9, 11
Brock v. *Hendershott*, 840 F.2d 339 (6th Cir. 1988) 8
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 8
Central States, Southeast & Southwest Areas Pension Fund v. *Central Transp., Inc.*, 472 U.S. 559 (1985) 10
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 13
City of Springfield v. *Kibbe*, 480 U.S. 257 (1987) 7
Donovan v. *Bryans*, 566 F. Supp. 1258 (E.D. Pa. 1983) .. 8, 9
Donovan v. *Daugherty*, 550 F. Supp. 390 (S.D. Ala. 1982) 8, 15
Donovan v. *Mazzola*, 716 F.2d 1226 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984) 15
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Eaves v. *Penn*, 587 F.2d 453 (10th Cir. 1978) 10
Fink v. *National Sav. & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985) 8
Firestone Tire & Rubber Co. v. *Bruch*, 109 S. Ct. 948 (1989) 11, 12
Foltz v. *U.S. News & World Report, Inc.*, 627 F. Supp. 1143 (D.D.C. 1986) 8, 9, 12
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Cases—Continued: Page

Hamilton-Brown Shoe Co. v. *Wolf Bros.*, 240 U.S. 251 (1916) 3
IUE AFL-CIO Pension Fund v. *Barker & Williamson, Inc.*, 788 F.2d 118 (3d Cir. 1986) 10
Jordon v. *Reliable Life Insurance Co.*, 694 F. Supp. 822 (N.D. Ala. 1988) 8
Kleinhans v. *Lisle Sav. Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987) 12
Lowen v. *Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987) 8, 9
Massachusetts Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134 (1985) 12, 14
Nieto v. *Ecker*, 845 F.2d 868 (9th Cir. 1988) 8, 13, 14, 16
Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 11
Powell v. *Chesapeake & Potomac Telephone Co.*, 780 F.2d 419 (1985) 15
Thornton v. *Evans*, 692 F.2d 1064 (7th Cir. 1982) 8

Statutes:

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:
29 U.S.C. 1001(b) 10
29 U.S.C. 1002(2)(A) 2
29 U.S.C. 1002(14)(b) 14
§§ 401-414, 29 U.S.C. 1101-1114 2
§ 406(a), 29 U.S.C. 1106(a) 14
§ 409, 29 U.S.C. 1109 ..... 8, 13
§ 409(a), 29 U.S.C. 1109(a) 13, 14
§ 502(a)(2), 29 U.S.C. 1132(a)(2) 4, 8, 13, 14, 15
§ 502(a)(3), 29 U.S.C. 1132(a)(3) 9, 11, 13, 14, 16
§ 502(a)(5), 29 U.S.C. 1132(a)(5) 4, 9, 11, 13, 14, 15
§ 514(a), 11 U.S.C. 1144(a) 11
§ 514(b)(2)(A), 11 U.S.C. 1144(b)(2)(A) 11
§ 514(b)(4), 11 U.S.C. 1144(b)(4) 11

Miscellaneous – Continued: Page

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120 Cong. Rec. 29,932 (1974) 12

H.R. Rep. No. 533, 93d Cong., 2d Sess. (1974) 11

Restatement (Second) of Trusts (1959) 10, 15

A. Scott, *The Law of Trusts*, (3d ed. 1967 & Supp. 1984):

Vol. 3 15

Vol. 4 10

S. Rep. No. 127, 93d Cong., 1st Sess. (1973) 11

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1271

HENRY KLEPAK, PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32a-51a) is reported at 853 F.2d 1298. The final judgment (Pet. App. 24a-27a) and amended final judgment (Pet. App. 28a-31a) of the district court and its findings of fact and conclusions of law (Pet. App. 1a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1988. A petition for rehearing was denied on October 14, 1988 (Pet. App. 52a). The petition for a writ of certiorari was filed on January 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of Labor filed this action to enforce the fiduciary responsibility provisions of Title I of the

Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1101-1114. It originated in an earlier suit by the Secretary also alleging violations of ERISA's fiduciary provisions (Pet. App. 2a-3a, 38a). In the prior action, the Secretary charged that Theodore Shanbaum and Ellis Carp had violated their fiduciary duties as trustees for the Lee Optical and Associated Companies Pension and Profit Sharing Plans (the "Plans"), which are ERISA-covered employee pension benefit plans (see 29 U.S.C. 1002(2)(A)) that provide retirement benefits to employees of Lee Optical, Inc., and its subsidiaries (Pet. App. 3a, 13a, 38a). Specifically, the Secretary asserted that Shanbaum and Carp had breached their fiduciary duties by lending and transferring substantial assets of the plans to Lee Optical, in which Shanbaum and Carp were the principal shareholders, and to Dal-Tex, Inc., a wholly-owned subsidiary of Lee Optical and sponsoring employer of the Plans (*id.* at 2a-3a, 37a-38a). Petitioner Henry Klepak, an attorney, represented the defendants—Shanbaum, Carp, Lee Optical, and Dal-Tex—in that action (*id.* at 3a, 38a).

The parties resolved the earlier action through a consent order (Pet. App. 3a, 38a). The consent decree provided that Shanbaum, the sole surviving trustee, would be discharged and that Oscar Lindemann would become trustee for the Plans (*ibid.*). The decree also obligated Dal-Tex to pay the pension and profit-sharing plans more than $1.1 million (*id.* at 38a). If Dal-Tex did not pay that amount within a specified time, the decree provided that Shanbaum and Carp (then represented by his estate) had to satisfy the obligation personally (*id.* at 4a, 38a).

When it became apparent that Dal-Tex could not make the necessary payments, Shanbaum and Carp's estate offered to transfer their two-thirds interest in a joint ven-

ture, SCP, to the Plans (Pet. App. 2a, 5a, 38a-39a).[1] SCP's assets consisted of a radio station and a microwave telecommunications system (*id.* at 38a-39a). Acting on petitioner's advice, Lindemann, the new trustee, accepted on behalf of the Plans the two-thirds interest in those properties at a valuation of approximately $1.5 million. Because that amount exceeded Shanbaum's and Carp's debt to the Plans, Lindemann caused the Plans to repay to SCP the "overpayment" of $364,558.96 (*id.* at 5a, 15a, 39a). In approving the transfer of the properties in satisfaction of the decree, Lindemann did not request or review any appraisals of the properties, but relied instead on petitioner's untrue representations that the Labor Department, as well as the district court that had entered the consent order, had approved the terms of the agreement transferring the properties (*id.* at 15a, 39a).[2]

In addition, Lindemann retained petitioner as attorney for the Plans (Pet. App. 10a). Petitioner advised Lindemann as to both Lindemann's rate of compensation by the Plans and the terms of his own compensation agreement with the Plans (*ibid.*). The latter agreement, which was irrevocable for four years, entitled petitioner to receive $2,500 per month for his services, excluding such services as litigation and legal research (*ibid.*).

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[1] The Plans already owned the remaining one-third interest in SCP, which was named for Shanbaum, Carp, and the Plans (Pet. App. 38a).

[2] The consent order provided that Shanbaum and Carp could satisfy their obligations under the decree by a transfer of property in lieu of cash, but only if the new trustee determined that the value of the property was equivalent to the amount owed under the decree and that the proposed transaction was in the interests of the Plans (Pet. App. 38a).

2. The Secretary subsequently brought this action pursuant to Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. 1132(a)(2) and (5), against petitioner, Lindemann, Shanbaum, the estate of Carp, and Lee Optical (Pet. App. 1a, 13a). The Secretary alleged, inter alia, that Lindemann, with the knowing participation of petitioner, had violated his fiduciary responsibilities to the Plans with respect to Shanbaum's and Carp's monetary obligations under the consent order and in setting his and petitioner's compensation from the Plans (*id.* at 14a-19a). In the district court, petitioner did not dispute that, as a matter of law, a nonfiduciary who has knowingly participated in a fiduciary breach may be held liable under ERISA to an employee benefit plan.

After trial, the district court held that Lindemann had violated his fiduciary responsibilities by failing to take appropriate steps to evaluate the property accepted on behalf of the Plans in the transfer agreement and by relying solely on petitioner's representations that the terms of the transfer were authorized (Pet. App. 15a). The district court further found that, while Shanbaum and Carp's interest had been valued at more than $1.5 million, their interest "was worth no more than $750,000" (*id.* at 9a). Accordingly, the court concluded that the Plans had suffered losses as a result of Lindemann's breaches (*id.* at 8a-9a, 16a). The court also held that petitioner, although a nonfiduciary, was liable for the Plan's losses because he had been a knowing participant in the fiduciary breaches (*id.* at 16a-17a). It found that petitioner had "drafted the transfer agreement and induced Lindemann to sign it with the false representation that the terms had been approved by the Secretary of Labor and the Court" (*id.* at 17a).

As to the compensation arrangements, the court held that Lindemann had breached his fiduciary responsibilities in setting his and petitioner's salary. The court specifically

found that the compensation agreement between petitioner and the Plans was "unreasonable" (Pet. App. 11a, 18a), and went on to hold that petitioner was a knowing and active participant in this breach as well (*id.* at 19a).

The court assessed joint and several liability against petitioner, Lindemann, and Shanbaum for the Plan's losses resulting from the transfer to it of the radio station and microwave system (Pet. App. 18a, 28a).[3] As to those losses, the court granted Lindemann's claim against petitioner for indemnification because petitioner "possessed superior knowledge of the situation * * * [and] because of his role as an attorney" (*id.* at 20a-21a). It also required petitioner to return his full salary to the plan; Lindemann was required to disgorge one-half of the salary he had received (*id.* at 29a).

3. On appeals by petitioner and Lindemann, the court of appeals affirmed in part and reversed in part (Pet. App. 32a-51a). The court approved the lower court's ruling, which petitioner had not challenged, that a non-fiduciary can be held liable under ERISA for his knowing and active participation in a fiduciary breach (*id.* at 41a). It rejected petitioner's argument that a non-fiduciary can be held liable only for the amount by which he profited from the breach, and agreed with the district court that petitioner was jointly liable for the full measure of the Plans' losses (*ibid.*). The court ruled, however, that the district court should not have ordered petitioner to indemnify Lindemann (*id.* at 42a). The court reasoned that Lindemann, a sophisticated businessman, had abdicated his responsibility to investigate the value of the transferred

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[3] The district court found that, in addition to petitioner, Shanbaum was a knowing participant in Lindemann's fiduciary breach of accepting the overvalued properties in satisfaction of the consent order (Pet. App. 16a-17a).

properties, and hence could not transfer his entire liability to a non-fiduciary participant (*ibid.*).

The court vacated the damage award, however, because it concluded that the Plans appeared not to have suffered a loss equal to the amount by which the transferred properties were overvalued (Pet. App. 45a). Since the radio station and microwave system seemed to be Shanbaum's and Carp's only assets, the court reasoned, the Plans may not have been damaged except to the extent that the Plans refunded money to them.[4] The court therefore remanded the case to the district court for it to determine if Shanbaum and Carp had any other assets that could have satisfied the consent order obligation (*id.* at 46a).[5]

Finally, the court ruled that the district court had not abused its discretion in requiring petitioner to reimburse the Plans for the compensation he had received (Pet. App. 49a).

ARGUMENT

1. Although petitioner now seeks (Pet. 6) to challenge the court of appeals' conclusion that ERISA imposes liability on non-fiduciaries who knowingly participate in fiduciary breaches, he may not do so because he did not raise that argument below. Moreover, the court below cor-

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[4] Noting that the Plans owned one-third of SCP, the court of appeals concluded that, although the Plans had made an overpayment of $364,558.96 to SCP, the Plans were actually damaged by only $243,038 as a result of the refund (Pet. App. 45a).

[5] The court of appeals vacated other aspects of the district court's damages award as well. The court reversed an allowance of $300,000 in operating losses because the Plans would have suffered those losses even if the properties had been properly valued (Pet. App. 46a-47a). In addition, it ordered the district court on remand to reconsider its award of prejudgment interest (*id.* at 47a-49a).

rectly stated, following the majority of the courts of appeals, that a non-fiduciary may be held liable in those circumstances. Review is not warranted on account of a contrary decision by the Ninth Circuit, since that decision is wrong and appears to be in conflict with another decision by that court of appeals.

a. In the courts below, petitioner did not contend that non-fiduciaries cannot be liable under ERISA for losses suffered by employee benefit plans as a result of fiduciary breaches that they knowingly aided and abetted. Rather, in the district court petitioner primarily argued that he had not participated in any fiduciary breaches and, in the court of appeals, he focused his challenge on the narrower ground that, as a non-fiduciary, his liability was limited to the amount of his profits from the breaches. Indeed, on appeal he acknowledged that non-fiduciaries may be required to disgorge their profits (C.A. Br. 26-27), and stated that "the issue resolved incorrectly by the Trial Court below is the *extent* of the non-fiduciary's liability" (*id.* at 27). Because petitioner did not raise below the issue he now seeks to present, this is not an appropriate case in which to decide whether a non-fiduciary may be held liable under ERISA. See *City of Springfield* v. *Kibbe,* 480 U.S. 257, 259 (1987) (writ of certiorari dismissed as improvidently granted because of "considerable prudential objection" to resolving questions that petitioner had failed to preserve in lower courts).[6]

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[6] Petitioner's focus on the *extent* of his liability rather than whether ERISA permits such liability at all provides a separate basis for declining review. The decision of the court of appeals did not finally dispose of this case, but remanded to the district court to redetermine the damages that the Plans sustained. Should petitioner be satisfied with the result on remand, he will have no need for relief from this Court. Should he still be dissatisfied with the extent of his liability, petitioner may renew his contentions here. There is, accordingly, no reason for

b. Furthermore, the court of appeals' statement that petitioner was properly held liable for the Plans' losses "as a nonfiduciary who knowingly participated in a breach of trust" (Pet. App. 41a) is correct. Virtually every court to address the issue has ruled that ERISA imposes liability on non-fiduciaries who knowingly participate in fiduciary breaches. *Brock* v. *Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987); *Fink* v. *National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985); *Thornton* v. *Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982). See also *Brock* v. *Gerace*, 635 F. Supp. 563, 566 (D.N.J. 1986); *Foltz* v. *U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1167-1168 (D.D.C. 1986); *Donovan* v. *Schmoutey*, 592 F. Supp. 1361, 1395-1396 (D. Nev. 1984); *Donovan* v. *Bryans*, 566 F. Supp. 1258, 1266-1267 (E.D. Pa. 1983); *Donovan* v. *Daugherty*, 550 F. Supp. 390, 410-411 (S.D. Ala. 1982); *Freund* v. *Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-642 (W.D. Wis. 1979). But see *Nieto* v. *Ecker*, 845 F.2d 868 (9th Cir. 1988); *Jordan* v. *Reliable Life Insurance Co.*, 694 F. Supp. 822, 829-830 (N.D. Ala. 1988) (dicta).

Section 409 of ERISA, 29 U.S.C. 1109, expressly makes a fiduciary liable for losses that a plan suffers because of the fiduciary's breach of his statutory duties. Section 502(a)(2) of ERISA, 29 U.S.C. 1132(a)(2), authorizes the Secretary of Labor, participants, beneficiaries, and fiduciaries to sue for relief under Section 409. Although

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this Court to depart from its usual practice of declining to review non-final orders of the courts of appeals. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916).

the statute contains no provision specifically imposing liability on non-fiduciaries, that liability exists in the broad enforcement authority that Sections 502(a)(3) and (5) of the Act, 29 U.S.C. 1132(a)(3) and (5), confer on the Secretary of Labor and on participants, beneficiaries, and fiduciaries. *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d at 1220; *Brock* v. *Gerace*, 635 F. Supp. at 566; *Foltz* v. *U.S. News & World Report, Inc.*, 627 F. Supp. at 1167-1168; *Donovan* v. *Bryans*, 566 F. Supp. at 1266-1267; *Freund* v. *Marshall & Ilsley Bank*, 485 F. Supp. at 641. Section 502(a)(5) empowers the Secretary to bring civil actions "(A) to enjoin any act or practice which violates any provision of [Title I of ERISA], or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of [Title I of ERISA]." Section 502(a)(3) provides participants, beneficiaries, and fiduciaries with the same broad authority.

Sections 502(a)(3) and (5) make clear Congress's intent to provide broader authority to redress violations of ERISA's fiduciary responsibility provisions than simply to impose liability on the fiduciaries alone. The authority that Sections 502(a)(3) and (5) provide—embracing any appropriate equitable relief to redress violations of ERISA—empowers the federal courts to grant the full range of equitable remedies to accomplish the remedial purposes of the Act. Under the law of trusts, it is a well-established equitable principle that a knowing participant in a fiduciary breach—whether or not a fiduciary himself—can be jointly and severally liable for the full amount of the loss sustained as a result of that breach.[7] See G. Bogert, *The Law*

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[7] The elements of knowing participation in a fiduciary breach are "(a) an act or omission which furthers or completes the breach, and (b) actual or constructive knowledge at the time that the transaction

of Trusts and Trustees §§ 868, 901 (rev. 2d ed. 1982); 4 A. Scott, *The Law of Trusts* §§ 290-295, 321-326 (3d ed. 1967 & Supp. 1985); *Restatement (Second) of Trusts* §§ 290-297, 321-326 (1959); *Blankenship* v. *Boyle,* 329 F. Supp. 1089, 1099 (D.D.C. 1971) (pre-ERISA decision involving an employee benefit plan).

Imposing such liability on non-fiduciaries also derives from the statute's purpose of protecting plans and their beneficiaries and from its legislative history, which demonstrates Congress's intent to adopt the common law of trusts when appropriate to achieve that purpose. ERISA is a "comprehensive remedial statute designed to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' " (*Eaves* v. *Penn,* 587 F.2d 453, 457 (10th Cir. 1978), quoting 29 U.S.C. 1001(b)) and, like other remedial statutes, should be given a broad construction to effectuate its goals. *IUE AFL-CIO Pension Fund* v. *Barker & Williamson, Inc.,* 788 F.2d 118, 124 (3d Cir. 1986). See also *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transp., Inc.,* 472 U.S. 559, 570-571 (1985). Imposing traditional trust law liability on persons who knowingly participate in fiduciary breaches deters violations of ERISA's provisions and provides plans with greater ability to make full recovery of any losses caused by fiduciary breaches. Cf.

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amounted to a breach or the legal equivalent of such knowledge." *Donovan* v. *Schmoutey,* 592 F. Supp. 1361, 1396 (D. Nev. 1984) (citations omitted). See also G. Bogert, *The Law of Trusts and Trustees* § 901, at 258-259 (rev. 2d ed. 1982). Thus, petitioner is incorrect when he asserts (Pet. 17) that the decision below sets no standards for the liability of a non-fiduciary attorney providing services to a plan. Moreover, petitioner did not dispute before the court of appeals, and does not now dispute, that he knowingly participated in a fiduciary breach when he made false representations to induce the Plans' trustee to accept properties at less than their true value.

Brock v. *Gerace,* 635 F. Supp. at 569 (plan's participants would be denied full relief if the Secretary were unable to recover from non-fiduciaries). Indeed, petitioner's narrow reading of ERISA affords participants and beneficiaries less protection of their interests in employee benefit plans than they enjoyed before ERISA was enacted,[8] and therefore should be avoided. Cf. *Firestone Tire & Rubber Co.* v. *Bruch*, 109 S. Ct. 948, 955-956 (1989).

Furthermore, the legislative history of ERISA indicates that Congress intended the statute "to provide *the full range of legal and equitable remedies available* in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants." H.R. Rep. No. 533, 93d Cong., 2d Sess. 17 (1974) (emphasis added); accord, S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973). The legislative history also

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[8] ERISA's preemption provision broadly provides that the statute supersedes state laws insofar as they "relate to any employee benefit plan." § 514(a), 11 U.S.C. 1144(a). Since civil actions to recover losses caused by breaches of fiduciary duties plainly relate to employee benefit plans and do not appear to fall into any exception to the preemption provision, such as the exception for state criminal laws (§ 514(b)(4), 11 U.S.C. 1144(b)(4)), it appears that such state causes of action are preempted. Indeed, in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987), this Court held that ERISA preempts state causes of action against insurance companies that administer employee benefit plans, even though Section 514(b)(2)(A), 11 U.S.C. 1144(b)(2)(A), excepts from preemption state laws regulating insurance. The Court concluded from the structure of the statute and its legislative history that "ERISA's civil enforcement remedies were intended to be exclusive" (481 U.S. at 54). Accordingly, if employee benefit plans cannot recover from non-fiduciaries who participate in fiduciary breaches under Sections 502(a)(3) and (5), they may not be able to do so at all.

establishes Congress's intent to federalize the common law of trusts and to apply it with a view to the special nature and purposes of employee benefits plans. A sponsor of the Act stated: "The objectives of these provisions are to make applicable the law of trusts; * * * to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust." 120 Cong. Rec. 29,932 (1974) (remarks of Sen. Williams). Thus ERISA's legislative history "makes clear that Congress intended to incorporate into ERISA fiduciary principles developed in the law of trusts." *Kleinhans* v. *Lisle Sav. Profit Sharing Trust,* 810 F.2d 618, 626 (7th Cir. 1987). See *Firestone Tire & Rubber Co.* v. *Bruch,* 109 S. Ct. at 954; *Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U.S. 134, 156-157 (1985) (Brennan, J., concurring) (footnote omitted) ("ERISA's legislative history also demonstrates beyond question that Congress intended to engraft trust-law principles onto the enforcement scheme, * * * and a fundamental concept of trust law is that courts 'will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests' "). Since the pre-ERISA law of trusts made non-fiduciaries liable for their knowing participation in fiduciary breaches (see pages 9-10, *supra*), the court of appeals correctly held that ERISA does as well.[9]

[9] As the court below held (Pet. App. 41a), petitioner is incorrect in asserting that a non-fiduciary's liability is limited to the extent of his profit from the breach. "[I]t is clear from those cases in which the non-fiduciary did not benefit, as well as from the way in which courts have generally stated the rule, that *participation*—not profit—is the predicate for liability." *Foltz,* 627 F. Supp. at 1168 (citations omitted) (emphasis in original). See also G. Bogert, *supra,* at 260 ("[i]n order that the third party be liable as a participant, it is not necessary to show that he benefited as a result of the transaction").

Moreover, the Secretary's interpretation of ERISA is reasonable and is therefore entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988) ("we note that we owe great deference to the interpretations and regulations of the Pension Benefit Guaranty Corporation * * *, the Internal Revenue Service * * * and the Department of Labor, which are the administrative agencies responsible for enforcing and interpreting ERISA"). Since the early days of the statute, the Secretary has consistently maintained that a non-fiduciary who knowingly participates in a fiduciary breach may be liable for losses arising out of the breach. See, *e.g.*, *Freund* v. *Marshall & Ilsley Bank, supra.* That construction is, if not clearly required by ERISA, at the very least, "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

c. The Ninth Circuit erred in *Nieto* v. *Ecker* by holding that a non-fiduciary generally cannot be held liable for knowingly participating in breaches of fiduciary duties. The court focused almost entirely on Section 409 of the Act and Section 502(a)(2), which, as noted, authorizes actions to enforce Section 409. See 845 F.2d at 875 (Wiggins, J., concurring) ("By reading section 409(a) in isolation, [the court] ignores the clear requirement of the Act to provide the broadest possible remedies under ERISA to plan beneficiaries"). That Congress specified a fiduciary's liability in Section 409, however, does not preclude construing the broad language of Sections 502(a)(3) and (5) to reach a wider class of persons who aid the commission of a fiduciary breach. As Judge Wiggins noted, Section 409(a) "is simply one section among many that impose liability on those who violate the substantive provisions" of ERISA.

845 F.2d at 875. Moreover, the analysis in *Nieto* runs headlong into the principle that a statute should be construed to effectuate its purpose. As we have shown, one important purpose of ERISA was to incorporate common law equitable trust remedies in order fully to protect employee benefit plans.[10]

The Ninth Circuit in *Nieto* also mistakenly relied (845 F.2d at 872), as does petitioner (Pet. 13), on this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell,* 473 U.S. 134 (1985). The Court held in *Russell* that fiduciaries are not liable to beneficiaries under Sections 409(a) and 502(a)(2) for extra-contractual compensatory and punitive damages resulting from the improper or untimely processing of claims.[11] The Court construed Section 409(a) as protecting the integrity of employee benefit plans rather than as redressing individual beneficiaries' rights, and thus concluded that extra-contractual damages are not available to participants under that provision (473 U.S. at 142). The Court also held that a private right of action for extra-contractual damages should not be inferred under the statute (*id.* at 145). Here, the Secretary seeks relief reimbursing the *plan* for its lost assets, thereby im-

[10] The court in *Nieto* recognized that a non-fiduciary could be liable in an action brought pursuant to Section 502(a)(3) when the non-fiduciary acted as a "party in interest" (29 U.S.C. 1002(14)(b)) and engaged in a prohibited transaction (29 U.S.C. 1106(a)). That basis for liability, standing alone, provides inadequate protection for employee benefit plans because not all non-fiduciary participants in fiduciary breaches are parties in interest and not all fiduciary breaches are prohibited transactions. There is, furthermore, no basis in the language of Sections 502(a)(3) or (5) to read those provisions to permit suits against non-fiduciaries who engage in prohibited transactions, but not against those who participate in fiduciary breaches.

[11] The Court noted that the respondent had disclaimed reliance on Section 502(a)(3), and accordingly did not analyze that Section (473 U.S. at 139 n.5).

plementing the purpose of Section 409, and the terms of Section 502(a)(5) are sufficiently broad to authorize traditional non-fiduciary liability, so that the question whether the remedy should be inferred does not arise.

The Ninth Circuit is the only court of appeals to have concluded that a non-fiduciary who knowingly participates in a fiduciary breach cannot be held liable under Sections 502(a)(3) or (5) of ERISA. As Judge Wiggins noted in his opinion concurring in the judgment on different grounds, the majority opinion "directly contradicts" *Donovan* v. *Mazzola*, 716 F.2d 1226 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984), and "creates an intra-circuit conflict." *Nieto*, 845 F.2d at 876. Until the Ninth Circuit resolves that intra-circuit conflict, this Court should not grant review to resolve the inter-circuit conflict that *Nieto* creates.

2. The court of appeals also correctly affirmed as within the district court's discretion its order requiring petitioner to reimburse the Plans for the compensation he received from them (Pet. App. 49a). The district court issued this order as relief for petitioner's knowing participation in fiduciary breaches, including the setting of his own compensation at an unreasonable level (*id.* at 18a-19a). There is nothing novel about that relief that would warrant this Court's review. Requiring a party to disgorge the profits he has received as the result of participation in a fiduciary breach is a traditional trust remedy. See, e.g., *Donovan* v. *Daugherty*, 550 F. Supp. 390, 411 (S.D. Ala. 1982). See also *Powell* v. *Chesapeake & Potomac Telephone Co.*, 780 F.2d 419, 424, citing *Restatement (Second) of Trusts, supra*, § 205. Moreover, it is within a court's discretion to reduce or deny the compensation of a fiduciary who has committed a breach (3 A. Scott, *The Law of Trusts* § 243, at 2139 (3d ed. 1967)) and, by analogy, the same remedial tool can appropriately

be applied to a non-fiduciary participant in a breach who receives compensation from the plan (Pet. App. 49a).

Petitioner obliquely suggests that the order is inappropriate because the Department "offered no evidence regarding the unreasonableness of [his] legal fees" (Pet. 19). However, the Secretary entered into evidence the compensation agreement, which included a clause making the contract irrevocable for four years, and the district court heard petitioner's testimony as to his duties. The district court found the compensation agreement to be unreasonable (Pet. App. 11a). That conclusion is supported by the evidence and is, in any event, largely a factual matter and thus inappropriate for review by this Court.[12]

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[12] Petitioner intimates (Pet. 18-19) that the judgment below, by ordering him to refund his compensation, conflicts with the decision in *Nieto* v. *Ecker*. But the court recognized in that case that a non-fiduciary acting as a "party in interest" could be liable for "receiving excessive compensation for legal services," and that a court would have equitable authority to "undo such illegal transactions" under Section 502(a)(3). 845 F.2d at 873, 874.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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